CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

* * *

TERRY JESS DENNIS, by and through KARLA BUTKO, as Next Friend,

Petitioner-Appellant,

vs.

MICHAEL BUDGE, Warden, and BRIAN SANDOVAL, Attorney General of the State of Nevada,

Respondents-Appellees.

D.C. No. CV-S-04-0798-PMP-RJJ
(Nevada, Las Vegas)

Appeal from the United States District Court for the District of Nevada

APPELLANT'S EXCERPTS OF RECORD

Volume X of XI

FRANNY A. FORSMAN
Federal Public Defender
MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, Suite 700
Las Vegas, Nevada 89101
(702) 388-6577

Counsel for Petitioner-Appellant

CA NO. 04-99003

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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TERRY JESS DENNIS, by and through KARLA BUTKO, as Next Friend,

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vs.

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(702) 388-6577

Counsel for Petitioner-Appellant

INDEX

Washoe County District Attorney

RICHARD A. GAMMICK
DISTRICT ATTORNEY

September 22, 2003

Karla K. Butko, Esq.
1030 Holcomb Avenue
Reno, NV 89502

Re: Terry Dennis

Dear Karla:

Pursuant to the enclosed letter, your client states he told you on September 4, 2003, he "no longer wish[es] to pursue any appeals and want my sentence to be carried out." Nevertheless, you filed an opening brief on behalf of Dennis on September 16, 2003. Given Mr. Dennis's letter, I had assumed you would move to dismiss the appeal. Perhaps I am wrong. Please let me know.

Yours truly,

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By _____
JOSEPH R. PLATER
Appellate Deputy

JRP/sm
Enclosure

Washoe County Court House, 75 Court Street, P.O. Box 30083, Reno, NV 89520-3083
(775) 328-3200 Fax - Criminal 328-3844 • Civil 328-3415

KARLA K. BUTKO, LTD.

A PROFESSIONAL CORPORATION

September 24, 2003

Joseph R. Plater, Esq.
Deputy District Attorney
Washoe County D.A.'s Office
50 W. Liberty, Third Floor
Reno, NV 89501

Re: State v. Dennis

Dear Joe:

I am in receipt of your letter of today's date concerning the status of the appeal of Mr. Dennis. Thank you for your inquiry. Mr. Edwards and I have met with our client at length and have filed the Opening Brief in this matter. We are not at a position where we could say that the statutory predicate that our client is ready to make a knowing, intelligent and voluntary relinquishment of his right to appeal has been satisfied. As such, it is our intention to further his appeal.

If this position changes and we are in a position to insure that our client is competent to make such a decision and that his decision meets the statutory obligations, I will certainly advise you of that fact. Until that time, it is our ethical obligation to continue to represent Mr. Dennis to the best of our ability in his pending appellate action.

If you have any questions, please feel free to give me a call. Thank you.

Sincerely,

Karla K. Butko
Attorney at Law

Joe - Look forward to reading your brief.
VTY
Scott

ER 1565

1030 Holcomb Avenue, Reno, Nevada 89502
Phone (775) 786-7118 Fax (775) 786-1361

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY JESS DENNIS,

Appellant,

v.

THE STATE OF NEVADA, No. 41664

Respondent.

_____/

MOTION FOR REMAND AND TO SUSPEND BRIEFING SCHEDULE

COMES NOW, the State of Nevada, and respectfully requests this Court to remand this case to the district court to conduct an evidentiary hearing to determine whether Dennis is competent to waive his appeal in the present case. The State further moves the Court to suspend the briefing schedule in this case until resolution of this motion. This motion is made pursuant to Rule 27 of the Nevada Rules of Appellate Procedure and the following points and authorities.

In Dennis v. State, 116 Nev. 575, 13 P.3d 434 (2000), this Court affirmed Dennis's conviction and sentence on direct appeal from his guilty plea and sentence of death. Dennis then filed a post-conviction petition for writ of habeas corpus in the district court. Pursuant to the State's motion, the district court dismissed the petition without an evidentiary hearing, and petitioner filed a notice of appeal.

On September 15, 2003, the district court sent the

State a letter the court had received from Dennis. In that letter Dennis states he met with his counsel, Karla Butko, on September 4, 2003, and told her: "I no longer wish to pursue any appeals and want my sentence to be carried out." (See attached letter from Dennis). Nevertheless, on September 16, 2003, counsel for Dennis filed an opening brief on behalf of Dennis. In response to the State's inquiry whether Dennis would dismiss his appeal (see attached letter from State), counsel for Dennis states she is not in a position to admit Dennis "is ready to make a knowing, intelligent and voluntary relinquishment of his right to appeal[.]" (See attached letter from counsel Butko).

On September 25, 2003, the State received another letter from Dennis. (See attached letter from Dennis). In that letter, dated September 17, 2003, Dennis again states he informed Ms. Butko on September 4, 2003, he wished to forego further appeals. Dennis further states he told Ms. Butko the same thing on September 16, 2003. Dennis also states the following:

> I don't know what I need to do to facilitate this so that's why I'm writing to you. Ms. Butko is doing all she can to delay things hoping I'll change my mind but I've been thinking this over for quite some time now and I assure you my mind's made up and I know what I'm doing. I just want it done and I thought maybe you could get things going.

Based on Dennis's letters and the letter from his counsel, the State respectfully requests this Court to remand the

/ / /

/ / /

case to the district court to conduct an evidentiary hearing to determine whether Dennis is competent to waive this appeal as he desires.

DATED: September 25, 2003.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By _____
JOSEPH R. PLATER
Appellate Deputy

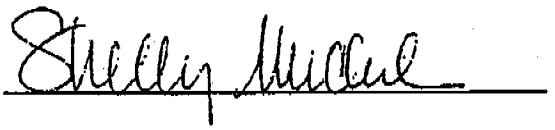
ER 1569

CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Karla K. Butko, Esq.
1030 Holcomb Avenue
Reno, NV 89502

DATED: September 25, 2003



ER 1570

Mr. Gammick, 9-17-03

My name is Terry Jess Klemis and I was given the death sentence in July 1999. Since then I've been appealing that sentence through my attorney Karla Butko.

On 9-4-03 I informed Ms. Butko that I no longer wish to continue my appeals and I repeated the same to her on 9-16-03.

I also wrote to judge Berry stating my wish to end my appeal and have my execution go forward.

I don't know what I need to do to facilitate this so that's why I'm writing to you. Ms. Butko is doing all she can to delay things hoping I'll change my mind but I've been thinking this over for quite some time now and I assure you my mind's made up and I know what I'm doing. I just want it done and I thought maybe you could get things going.

Thankyou,
Terry J. Klemis

SEP 25 2003

ER 1572

Amicus App. 069

Exhibit AR

OCT 23 2003

IN IE SUPREME COURT OF THE ATE OF NEVADA

TERRY JESS DENNIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41664

FILED

OCT 22 2003

DEPUTY CLERK

ORDER GRANTING MOTION

This is an appeal from a district court order dismissing without an evidentiary hearing a first post-conviction petition for a writ of habeas corpus in a capital case. Appellant's opening brief was filed on September 16, 2003. On September 26, 2003, the State moved for remand and to suspend the briefing schedule. The State's motion was based on letters appellant addressed to the district court and the Washoe County District Attorney, dated September 9 and 17, 2003, respectively. In these letters, appellant expresses his desire to withdraw this appeal. He also indicates that he has shared this desire with his counsel, Karla K. Butko, who "is doing all she can to delay things," and he requests assistance in his efforts toward withdrawal of the appeal.

On October 3, 2003, Butko opposed the State's motion on appellant's behalf. Butko states that appellant's expressed desire to withdraw this appeal contradicts his statements made to her on September 4 and 16, 2003, whereby he agreed to proceed with the appeal. Butko further suggests that appellant may be under a mental health disability and may not have the ability to make an adequately considered decision to withdraw his appeal. Therefore, Butko argues, under SCR

164,[1] she is justified in protecting his right to appeal by proceeding with the appeal and opposing the State's motion to remand for a competency determination.

However, whether to proceed with an appeal is among the fundamental decisions that belong to the defendant and not his counsel.[2] So long as such a decision is knowingly and voluntarily made by a competent defendant, his choice must be honored.[3] Moreover, the waiver of the right to appeal is no less valid because it is made by a defendant in a capital case.[4]

A capital defendant's desire to waive his appeal and be executed, however, does not end this court's inquiry. The district court must first conduct a hearing, at which appellant is present and represented by counsel, to determine appellant's competence and the

---

[1]SCR 164 provides:

> 1. When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> 2. A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

[2]See Johnson v. State, 117 Nev. 153, 161-62, 17 P.3d 1008, 1014 (2001).

[3]See id.

[4]See Geary v. State, 115 Nev. 79, 82-83, 977 P.2d 344, 346 (1999); Calambro v. State, 111 Nev. 1015, 1019-20, 900 P.2d 340, 343 (1995).

validity of his waiver of appeal.[5] Accordingly, we grant the State's motion to remand this matter to the district court for further proceedings.[6] Considering the unusual circumstances here, the district court should assure itself, before conducting any further proceedings addressing appellant's competence and waiver of appeal, that Butko may properly continue to represent appellant,[7] and if she may not, the court should appoint replacement counsel.

Next, in determining competence, the district court should ascertain (1) whether appellant has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding and (2) whether appellant has a rational and factual understanding of the proceedings.[8] The district court must enter in the record formal, written findings regarding appellant's competence to waive the appeal.[9]

If the district court determines that appellant is competent to waive the appeal, before it can accept his waiver, it must find that it is knowingly and voluntarily made, with a full comprehension of its

---

[5]See Geary, 115 Nev. at 82-83, 977 P.2d at 346.

[6]See SCR 250(8)(b).

[7]See generally SCR 152(1) (discussing obligation to abide by decisions of client concerning the objectives of representation); SCR 153 (requiring a lawyer to act with "reasonable diligence"); SCR 157(2) (discussing conflicts of interest).

[8]Geary, 115 Nev. at 83, 977 P.2d at 346 (citing Doggett v. Warden, 93 Nev. 591, 593, 572 P.2d 207, 208 (1977)).

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ramifications.[10] Therefore, the district court must canvass appellant sufficiently to determine that he has a rational understanding of his circumstances, his right to appeal, and the legal consequences and effect of the withdrawal of this appeal, including that he would be forgoing possibly life-saving litigation, that he cannot thereafter seek to reinstate the appeal, that any issues that were or could have been brought in this appeal are forever waived and that his death sentence would presumably be carried out without further delay or intervention.[11]

Accordingly, the district court shall have sixty (60) days from the date of this order within which to conduct any appropriate hearings and to enter formal, written findings regarding appellant's competency to waive his appeal and the validity of any such waiver. Immediately upon the entry of the findings, the clerk of the district court shall transmit them to the clerk of this court as a supplemental record on appeal, along with any additional documents, motions, orders, transcripts or other filings comprising the original record made in the district court after June 30, 2003, the date upon which this appeal was docketed in this court.

Additionally, we note that appellant raised three claims in his original petition and thirty more in a supplemental pleading. The district court's order, which is the subject of this appeal, addressed only the legal grounds for the dismissal of appellant's claims which were based on the imposition of the death sentence by the three-judge panel. We are unable to ascertain the basis for the summary dismissal of appellant's remaining claims, i.e., whether the district court determined these claims did not warrant an evidentiary hearing because they were procedurally barred,

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[10]See id. at 82-83, 977 P.2d at 346.

[11]See generally id.

belied by the record or failed to state facts that, if true, would entitle appellant to relief. NRS 34.830(1) mandates that "[a]ny order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court." Therefore, if the district court determines that appellant has not validly waived his right to appeal, the district court shall then have thirty (30) days from the date of its order resolving the competency and validity of waiver issues to enter supplemental findings of fact and conclusions of law that adequately state the court's reasons for dismissing without an evidentiary hearing any claims not already specifically addressed in the initial order dismissing appellant's petition.

Finally, appellant's counsel filed on his behalf a twenty-eight-page opening brief. Upon our review of this brief, it is obvious that the type font used in the brief is much smaller than the ten-characters-per-inch font required by NRAP 32(a). We hereby direct the clerk of this court to strike appellant's opening brief. Further, we grant the State's request to suspend briefing while appellant's competency and waiver of appeal are addressed in the district court. Should briefing ultimately be reinstated, counsel is cautioned to adhere to briefing form requirements at NRAP 32.

It is so ORDERED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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My name is Terry Jess Klemis and I was given the death sentence in July 1999. Since then I've been appealing that sentence through my attorney Karla Butko.

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Thankyou,
Terry J. Klemis

SEP 25 2003

ER 1580

Amicus App. 069

OCT 23 2003

IN IE SUPREME COURT OF THE .ATE OF NEVADA

TERRY JESS DENNIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41664

FILED

OCT 22 2003

CHRISTINA M. BLOOM
CLERK OF SUPREME COURT
DEPUTY CLERK

ORDER GRANTING MOTION

This is an appeal from a district court order dismissing without an evidentiary hearing a first post-conviction petition for a writ of habeas corpus in a capital case. Appellant's opening brief was filed on September 16, 2003. On September 26, 2003, the State moved for remand and to suspend the briefing schedule. The State's motion was based on letters appellant addressed to the district court and the Washoe County District Attorney, dated September 9 and 17, 2003, respectively. In these letters, appellant expresses his desire to withdraw this appeal. He also indicates that he has shared this desire with his counsel, Karla K. Butko, who "is doing all she can to delay things," and he requests assistance in his efforts toward withdrawal of the appeal.

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However, whether to proceed with an appeal is among the fundamental decisions that belong to the defendant and not his counsel.[2] So long as such a decision is knowingly and voluntarily made by a competent defendant, his choice must be honored.[3] Moreover, the waiver of the right to appeal is no less valid because it is made by a defendant in a capital case.[4]

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[3]See id.

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validity of his waiver of appeal.[5] Accordingly, we grant the State's motion to remand this matter to the district court for further proceedings.[6] Considering the unusual circumstances here, the district court should assure itself, before conducting any further proceedings addressing appellant's competence and waiver of appeal, that Butko may properly continue to represent appellant,[7] and if she may not, the court should appoint replacement counsel.

Next, in determining competence, the district court should ascertain (1) whether appellant has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding and (2) whether appellant has a rational and factual understanding of the proceedings.[8] The district court must enter in the record formal, written findings regarding appellant's competence to waive the appeal.[9]

If the district court determines that appellant is competent to waive the appeal, before it can accept his waiver, it must find that it is knowingly and voluntarily made, with a full comprehension of its

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[5]See Geary, 115 Nev. at 82-83, 977 P.2d at 346.

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ramifications.[10] Therefore, the district court must canvass appellant sufficiently to determine that he has a rational understanding of his circumstances, his right to appeal, and the legal consequences and effect of the withdrawal of this appeal, including that he would be forgoing possibly life-saving litigation, that he cannot thereafter seek to reinstate the appeal, that any issues that were or could have been brought in this appeal are forever waived and that his death sentence would presumably be carried out without further delay or intervention.[11]

Accordingly, the district court shall have sixty (60) days from the date of this order within which to conduct any appropriate hearings and to enter formal, written findings regarding appellant's competency to waive his appeal and the validity of any such waiver. Immediately upon the entry of the findings, the clerk of the district court shall transmit them to the clerk of this court as a supplemental record on appeal, along with any additional documents, motions, orders, transcripts or other filings comprising the original record made in the district court after June 30, 2003, the date upon which this appeal was docketed in this court.

Additionally, we note that appellant raised three claims in his original petition and thirty more in a supplemental pleading. The district court's order, which is the subject of this appeal, addressed only the legal grounds for the dismissal of appellant's claims which were based on the imposition of the death sentence by the three-judge panel. We are unable to ascertain the basis for the summary dismissal of appellant's remaining claims, i.e., whether the district court determined these claims did not warrant an evidentiary hearing because they were procedurally barred,

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[10]See id. at 82-83, 977 P.2d at 346.

[11]See generally id.

belied by the record or failed to state facts that, if true, would entitle appellant to relief. NRS 34.830(1) mandates that "[a]ny order that finally disposes of a petition, whether or not an evidentiary hearing was held, must contain specific findings of fact and conclusions of law supporting the decision of the court." Therefore, if the district court determines that appellant has not validly waived his right to appeal, the district court shall then have thirty (30) days from the date of its order resolving the competency and validity of waiver issues to enter supplemental findings of fact and conclusions of law that adequately state the court's reasons for dismissing without an evidentiary hearing any claims not already specifically addressed in the initial order dismissing appellant's petition.

Finally, appellant's counsel filed on his behalf a twenty-eight-page opening brief. Upon our review of this brief, it is obvious that the type font used in the brief is much smaller than the ten-characters-per-inch font required by NRAP 32(a). We hereby direct the clerk of this court to strike appellant's opening brief. Further, we grant the State's request to suspend briefing while appellant's competency and waiver of appeal are addressed in the district court. Should briefing ultimately be reinstated, counsel is cautioned to adhere to briefing form requirements at NRAP 32.

It is so ORDERED.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

ORIGINAL

FILED

2003 NOV 19 AM 11:53

ROBERT L. MARTIN, JR.

BY P. Croney

DEPUTY

CODE: 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

TERRY JESS DENNIS,

Petitioner,

VS.

THE STATE OF NEVADA,

Respondent

Case No. CR99P-0611

Dept. No. 1

ORDER
(DEATH PENALTY CASE)

On November 17, 2003, this Court conducted a hearing upon the Nevada Supreme Court's Order of Remand filed October 22, 2003. Pursuant to that Order, this Court must conduct hearings to determine the Petitioner's competence and the voluntariness of his expressed desire to waive appeals in this case. Further, this Court was directed to first determine whether attorney Karla K. Butko could properly continue to represent Petitioner Dennis, and if not, this Court was directed to appoint replacement counsel. In light of the foregoing, the Court orders as follows:

1. Attorney Butko's motion to withdraw as Petitioner's counsel, not opposed by the State, is granted.

2. Attorney Scott W. Edwards, is appointed to represent Petitioner in all further proceedings.

3. Both Attorney Butko and Attorney Edwards are ordered to cooperate and assist with respect to any reasonable inquiry or request from the psychiatrist hereinafter appointed to conduct a competency evaluation of Petitioner.

4. Dr. Thomas Bittker, M.D. is appointed to interview, test and evaluate the competency of Petitioner. Dr. Bittker shall compose a written report and submit it to this Court no later than 4 p.m. on December 2, 2003. The written report shall specifically address: (1) whether Petitioner has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding and (2) whether appellant has a rational and factual understanding of the proceedings.[1] Dr. Bittker shall state in his report any professional opinion he has regarding the Petitioner's competence to waive appeal and forego possibly life-saving litigation. Further, Dr. Bittker shall review all medication taken by Petitioner to evaluate what if any impact said medication has on the Petitioner's state of mind and competence.

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[1] This Court is mindful of the Nevada Supreme Court's holding in Geary v. State, 115 Nev. 79, 83, 977 P.2d 344 (1999):

> To waive one's automatic right to an appeal from a death sentence, the defendant must show that his or her decision was "intelligently made and with full comprehension of its ramifications." Cole v. State, 101 Nev. 585, 588, 707 P.2d 545, 547 (1985); see also Gilmore v. Utah, 429 U.S. 1012, reh'g denied, 429 U.S. 1030 (1976) (waiver must be made knowingly and intelligently by a defendant competent to make the rational choice to forgo further, and possibly life-saving, litigation). Before accepting the defendant's waiver, the district court must conduct a hearing to determine competence. Kirksey v. State, 107 Nev. 499, 502, 814 P.2d 1008, 1010 (1991). The test for competence is (1) whether the defendant has sufficient present ability to consult with his or her attorney with a reasonable degree of factual understanding, and (2) whether the defendant has a rational and factual understanding of the proceedings. Doggett v. Warden, 93 Nev. 591, 593, 572 P.2d 207, 208 (1977). The district court is then required to enter formal, written findings of fact regarding the defendant's competence. Kirksey, 107 Nev. at 502, 814 P.2d at 1010; see also Calambro v. State, 111 Nev. 1015, 1019 n.4, 900 P.2d 340, 343 n.4 (1995) (emphasizing the district court's "mandatory duty" to enter written findings regarding competency when a defendant seeks to waive an appeal from a death sentence). This court has the duty to review those findings, and the record as a whole, to determine the validity of the death sentence. Kirksey, 107 Nev. at 502, 814 P.2d at 1010.

ER 1590

Finally, Dr. Bittker shall appear and testify in this Court as to his findings and conclusions on December 4, 2003 at 2 p.m. Dr. Bittker shall be paid for his services out of the post-conviction fund administered by the State of Nevada Public Defender's Office.

5. The Warden of the Nevada State Prison is hereby ordered to provide Dr. Bittker immediate access to review all medical, psychiatric and mental health records pertaining to the Petitioner in the possession of the Department of Prisons. Further, the Warden is directed to provide Dr. Bittker access and reasonable accommodation in interviewing Petitioner Terri Jess Dennis. Dr. Bittker shall arrive at 9:30 a.m. on November 24th, 2003 at the NSP Gatehouse for admittance to conduct his interview of Petitioner Dennis and his review of medical and mental health records.

6. After the conclusion of hearing on December 4, 2003, this Court shall enter in the record, formal written findings regarding Petitioner's competence to waive his appeal.

7. If this Court determines that Petitioner is competent to waive his appeal, it shall conduct a canvass of Petitioner to determine whether Petitioner's waiver of his appeal is knowingly and voluntarily made with a full comprehension of its ramifications. This Court shall thereafter enter formal written findings regarding the validity of Petitioner's waiver of appeal.

8. If this Court determines that Petitioner has not validly waived his right to appeal, it shall enter written findings and conclusions of law stating its reasons for dismissing without an

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evidentiary hearing any claims not already specifically addressed in its initial order dismissing Petitioner's post-conviction habeas corpus petition and supplement thereto. Such findings shall be filed no later than 30 days after the entry of written findings of incompetence or invalidity of appeal waiver as described above.

DATED this 19th day of November 2003.

Janet Berry

DISTRICT JUDGE

Thomas E. Bittker, M.D., Ltd.

Diplomate, American Board of Psychiatry and Neurology
Fellow, American Psychiatric Association
Diplomate in Forensic Psychiatry, American Board of Psychiatry and Neurology

80 Continental Drive, Suite 200
Reno, NV 89509
(775) 329-4284

November 24, 2003

The Honorable Janet Berry
Department One
Second Judicial District Court
P.O. Box 30083
Reno, NV 89520-3083

Re: DENNIS, TERRY JESS
Case No.: CR99T-0611 - Death Penalty Case

Dear Judge Berry:

Pursuant to your court order, I have reviewed materials provided to me by Mr. Dennis' attorney, Scott Edwards, and have interviewed the defendant, as well as interviewed Karla K. Butko, prior defense counsel, and Scott W. Edwards, current defense counsel.

The conclusion of my assessment have been incorporated in the enclosed report.

Should you have any questions about this, prior to the hearing, I would welcome your direct contact with me. Thank you for giving me the opportunity to serve you.

Sincerely,

Thomas E. Bittker, MD

TEB:accu/ctc
enclosure
pc: Defense Counsel: Scott W. Edwards, Esq.
1030 Holcomb Avenue
Reno, NV 89502
Phone No.: 786-4300
Fax No.: 786-1361
eMail No.: nvlaw@aol.com

Thomas E. Bittker, M.D., Ltd.

Diplomate, American Board of Psychiatry and Neurology
Fellow, American Psychiatric Association
Diplomate in Forensic Psychiatry, American Board of Psychiatry and Neurology

80 Continental Drive, Suite 200
Reno, NV 89509
(775) 329-4284

COURT ORDERED EVALUATION

Re: DENNIS, TERRY JESS
Case No.: CR99T-0611 - Death Penalty Case
Date: 11/24/03
Ordered By: The Honorable Janet Berry
Department One
Second Judicial District Court
of the State of Nevada
in and for the County of Washoe

OPINION SOUGHT: Are there any mitigating elements in the psychiatric presentation of Terry Jess Dennis that would permit justification for appealing his current death penalty?

Specifically:
1) Has the petitioner sufficient present ability to consult with his attorney with a reasonable degree of factual understanding?
2) Does the appellant have a rational and factual understanding of the proceedings?
3) In addition, is the petitioner sufficiently competent to wave appeal and forego possible life-saving litigation?
4) What impact do the medications that the petitioner is taking have on his state of mind and competence?

SOURCES OF INFORMATION:
Review of documents provided to me by Scott W. Edwards, Esq. These documents include the following:
1) Volume 1 of the appeal of the death penalty judgment of The Honorable Janet J. Berry.
2) Arraignment of 4/16/99.
3) Documents from the defendant's stay at the Washoe County Detention Center including, in particular, his medical history and interventions.
4) Documents reflective of a second degree assault charge filed in Snohomish County of the State of Washington on 12/5/78.
5) Arguments submitted by prosecuting attorney, Richard Gamick, Esq., dated 7/19/99.
6) Transcript of proceedings of 7/19/99.
7) Military records reference the defendant's tour of duty in the military.
8) Social work assessment of Susan Trist, MA, dated 8/29/98.
9) Psychiatric assessment of Philip A. Rich, MD, dated 7/7/98.

10) Transcript of defendant's statement on the day of arrest, 3/9/99.
11) Records from the Nevada Mental Health Institute dated 8/8/96.

Medical records and mental health records provided to me at the Nevada State Penitentiary on this date, 11/24/03.

Interview with defendant by me on 11/24/03.

Interview with prior defense counsel, Karla K. Butko, Esq., dated 11/24/03.

Interview with current defense counsel, Scott W. Edwards, Esq., dated 11/24/03.

RELEVANT HISTORY: The defendant was born on 10/14/46 in Everett, Washington. His birth father abandoned his mother prior to the defendant's birth. His biological mother died approximately one year after the defendant's birth. The defendant has no memory of biological mother, but does report that biological mother and her relatives were heavily involved in alcohol and drug abuse.

The defendant was adopted into the care of Emma and Jess Dennis.

The defendant alleges that his childhood was "idyllic," however he does acknowledge significant trauma following nature.

His father would beat him frequently, both with his fist and with a belt. The defendant acknowledges, however, that he felt the beatings were justified, given his misbehavior. Secondly, the defendant acknowledges that he was frequently beating by his school teachers and describes himself as somewhat of a hellion as a youth.

Thirdly, not acknowledging the trauma, but of interest in the defendant's history, is that he had a number of sexual encounters with his adoptive mother, which he felt were pleasurable. Unfortunately, at age 12, the defendant's adoptive mother died due to the consequences of breast cancer.

The defendant never did well in school. He states he was easily distracted, was prone to impulsivity and acted out frequently.

In addition, he acknowledged a propensity to fire set and stated that he had a longstanding fascination with fire.

He denied, however, a history of cruelty to animals.

He did state that he had a negative reaction to his adoptive

brother, ten months his junior, and has never sustained a positive relationship with his brother. Following his adoptive mother's death, the positive figure in his life was his adoptive father, even though his adoptive father was perceived as a disciplinarian.

At approximately age 15, the defendant was involved in his first major offense. He burglarized a supply company, having been informed that the safe at this company would be open at noon. In the process, he stole approximately $400. His accomplice, a young man, three years his senior, was subsequently arrested for armed robbery. At the time of his arrest, that accomplice informed on Mr. Dennis, who was then picked up by the police. Mr. Dennis believes that the stress associated with this arrest and the dismay experienced by his adoptive father led to his adoptive father's fatal heart attack, which occurred within weeks following the arrest. He states that to this day, he continues to feel responsible for his adoptive father's death.

In spite of a checkered school history, the defendant ultimately graduated at approximately age 18 and, with no future direction obvious to him, he enlisted in the Air Force.

He attained the rank of Specialist 3 in the Air Force, working initially in electronics and later in clerical work. He was stationed in the United States and in Thailand. He was given an early release from the Air Force, three months prior to his anticipated discharge, following his tour of duty in Thailand. He states that his adoptive brother intervened in his behalf, just using as the justification, the Sullivan Act, as the brother, himself, was stationed in Vietnam. *Note that the records reflect that the defendant was discharged because he was "suicidal."*

Following discharge from the service, the defendant returned to Washington, worked briefly in Washington, and then moved to South Dakota.

In South Dakota he was arrested for what was to be a series of substance and alcohol related offenses. These offenses have included arrests for possession of marijuana, assault, assault on a police officer, arson, and the instant offense of homicide, which occurred on March 7th or 8th of 1999.

According to defense counsel, Karla Butko, the defendant had lost a roommate to death in the week prior to the instant offense. It was only after this, according to her history, that the defendant became preoccupied with fantasies of killing a partner during a sexual encounter.

Defense counsels, Edward and Butko, both concur that the defendant's desire to die came following the rejection of his defense counsel's effort to seek appellant review of the original sentence.

SUBSTANCE ABUSE HISTORY: The defendant acknowledges a history of substance dependence going back to his mid-teenage years. He began abusing tobacco at age 12 and sustained a nicotine dependence of one pack of cigarettes per day through the present time. By age 15, substance abuse had progressed to drinking to intoxication two to three times a week which, by the time he reached the service at age 18, was virtually daily intoxication. The defendant acknowledges multiple DUIs, approximately six, multiple offenses related to the disinhibiting effects of alcohol, and frequent blackouts. The defendant began using cannabis in his teenage years and used cannabis regularly until his incarceration. Cocaine was the next substance of abuse, and the defendant progressed to rock cocaine, but then ultimately invested himself in using amphetamines during the last two years of his liberated life (1997 through 1999). He has also used heroin and hallucinogens. He had a propensity to inject cocaine, amphetamine and heroin. He is now hepatitis C positive, but is not HIV positive.

MEDICAL HISTORY: The patient is hepatitis C positive, suffers from psoriasis, but denies any history of seizures. He does acknowledge frequent head injuries coincident to fights. He denies olfactory aura, significant deja vu experiences, or significant periods of amnesia, with the exception of his alcohol-related blackouts.

He also complains of angina, but has not had this evaluated.

Ms. Butko shared with me the defendant's belief that he suffers lung cancer.

PSYCHIATRIC REVIEW OF SYSTEMS: The defendant denies panic disorder. He vehemently denies any homicidal intent toward anyone, other than the intended victim, although also stating that in the weeks and months prior to the instant offense, he had fantasies of killing a woman while having sex with her.

The records reveal that he had made several attempts to seek admission at the VA Hospital to contain his homicidal fantasies, but hospitalizations were brief and ultimately he was turned out to the community.

MEDICATION HISTORY: The defendant has been on a variety of psychotropic medications including Prozac, Paxil, Zoloft, Elavil, trazodone, Depakote, and lithium. During his incarceration at the

Nevada State Penitentiary, he had been on Elavil, trazodone and lithium. Current lithium dosage is 900 mg per day, current trazodone dosage is 150 mg per day. The defendant states that he is "okay" on these medications, but does acknowledge occasional auditory and visual hallucinations.

The defendant denies any delusional percepts and states that he has never felt as if he were either the object of persecution or grandiosely entitled.

Mr. Dennis states he has had a history of very modest mood fluctuations, but has never experienced frank mania. He does not have significant fluctuations in sleep, other than as related to his substance use. On the other hand, he admits to frequent periods of despair, profound negativity, and feelings of hopelessness, helplessness, and worthlessness. He admits to chronic suicidal ideation since he was a child and, in one report, admitted to 12 suicide attempts. In my interview with the defendant, he acknowledged only four, two by carbon monoxide and two by overdose. "I don't do that self-mutilating stuff."

MENTAL STATUS: The defendant presented as a rather sallow complected man with a shaved head and had no significant body markings.

He was civil, but emotionally distant.

He spoke clearly and distinctly in an audible tone. His utterances showed no conspicuous lag, latency, or significant speech acceleration or retardation.

His affect, albeit constricted, was congruent. On one occasion, he appeared on the threshold of tears as he discussed his adoptive father's death. He acknowledged no particular remorse for the instant offense.

His thoughts were focused, there was no evidence of tangentiality an circumstantiality. At times, he was able to acknowledge positive interest in his life, including, in particular, a fascination with the works of John Sanford, which came to him after he was incarcerated for this instant offense.

Reflecting on Mr. Sanford's novel, he admitted freely that he identified with the villains and not with the detective protagonist in the novel.

Although denying homicidal ideation, he repeatedly acknowledged a desire to die.

There were no evidences of perceptual distortions manifested during the interview, although he stated that he had a history of such distortions in the past.

When questioned about significant relationships, the defendant specifically denied any relationship with anybody of significance. In particular, he stated his friend wants nothing to do with him. He does have a pen-pal who corresponds with him. In spite of this assertion, on several occasions he mentioned his prior defense counsel, Ms. Karla Butko, with some positive regard.

Interestingly, at the close of the interview, he shook my hand and acknowledged that he was pleased to have had the opportunity to speak with me.

OTHER ELEMENTS IN THE HISTORY OF SIGNIFICANCE: I note in the pathology report that the victim of the defendant's homicide was a woman who was in severely compromised health coincident to liver failure and arteriosclerotic heart disease. In addition, she had a blood alcohol level of 0.4, reflective of somebody who had either ingested enormous quantities of alcohol or had a severely compromised liver function.

FORMULATION: The defendant presents with a history of multiple life failures and multiple rejections. He acknowledges a pattern of significant rejection sensitivity and has stated to me during the interview that he is quite isolated, caring for no one, and having no one who cares for him.

These life rejections have included his initial adoption out following the death of his mother, possibly secondary to the consequences of alcohol, the death of his adoptive mother at age 12 after an extensive sexual liaison with the defendant, and the death of his adoptive father soon after an arrest for burglary.

The defendant's life has been severely compromised by his substance dependence, alcohol, amphetamine and cocaine being the principal elements in his self-destructive behavior.

Rejections continued throughout the defendant's life and were highlighted in the immediate period prior to the offense with the death of a roommate.

The defendant acknowledges to me at least four episodes where he attempted to kill himself, and had made several pleas to be hospitalized at the VA Hospital, which were rejected in the time immediately prior to the instance offense.

This is a man whose life has been consumed by his alcohol and substance dependency about which he feels substantial self-revulsion. He had not had employment for the four years prior to the instant offense. He was victimized by his own dependence and that dependence ultimately culminated in his desire to seek shelter and care at the VA Hospital.

The defendant's choice of victim is of particular interest.

I was unable to learn much about the victim, other than her state of health at the time of her death, which appeared to be quite compromised.

Although the defendant boasted to police that he had been involved in multiple killings, at the time of my interview with the defendant he specifically denied a pattern of serial killings and there is no evidence to reflect that was his pattern. Indeed, in spite of the fact that he is confronting the death penalty and quite willing to accept this, he vehemently denies ever abusing a woman physically, other than at the time of the instance offense.

In summary, Mr. Dennis presents as a profoundly dependent man consumed by self-hatred, who chose a victim very much like himself, whose life appeared to be on the threshold of ending.

It is quite consistent with this pattern that the defendant both killed the victim and is seeking the death penalty as a convenient way out of life, and a way of assuring himself that ultimately he will die.

In addition to the diagnoses listed below, the defendant has a history consistent with Attention Deficit/Hyperactivity Type.

DIAGNOSES:

AXIS I:

1) Bipolar Disorder, Type II, 296.89
2) Alcohol Dependence, 303.90
3) Amphetamine Dependence, now in remission, 304.40
4) Cannabis Dependence, 304.30
5) Cocaine Dependence, 304.20
6) Nicotine Dependence, 305.10
7) Posttraumatic Stress Disorder, by history, 309.81 (cardinal signs denied during my interview with the defendant)
8) Attention Deficit/Hyperactivity Type, 314.01

#2 through #5 above in institutional remission.

AXIS II: Mixed Personality Disorder with Antisocial, Cyclothymic, Borderline, and Schizoid Features, 301.90

AXIS III: 1) Hepatitis C.
2) Psoriasis.

AXIS IV: Severe. Social isolation, institutionalization, problems with the criminal justice system.

AXIS V: 50/50.

ADDRESSING QUESTIONS OF THE COURT: As to the specific questions raised by the court, my responses are as follows:

1) The defendant does have sufficient present ability to consult with his attorney with a reasonable degree of factual understanding.
2) The defendant has a rational and factual understanding of the proceedings. He is fully aware of the charges that he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty. He is also aware of the legal options available to him and the consequences of his not proceeding with these options.
3) The defendant is currently taking medications that are reasonable and consistent with the diagnosis of Bipolar Disorder, and his primary psychiatric problems, alcohol, amphetamine, and cocaine dependence, are contained by virtue of the total institutional control in his life.
4) The medications that he is taking are not having any unusual effect on the defendant's ability to make decisions in behalf of his own interest, and to cooperate with counsel or to participate in the court hearing.

Having acknowledged all of the above, on the other hand, the defendant has sustained over years episodes of suicidal ideation, suicide attempts, and self-destructive behavior, which heralded both the instant offense and his current legal strategy. I believe, with a reasonable degree of medical certainty, that the defendant's desire to both seek the death penalty and to refuse appeals in his behalf are directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-hatred.

Clearly, an alternative to consider is whether or not the defendant's view of himself is simply a realistic incorporation of society's view of his "monstrous" behavior. On the other hand, it is conceivable and, in my mind, likely that both the defendant's

offense and his current court strategy springs from his psychiatric disorder and his substance abuse disorder, that he wishes to die and he wishes to be certain of a reasonably humane death. Consequently, the death penalty, as provided by the state, is quite congruent with both his intent and his psychiatric disorder.

Thomas E. Bittker, MD
TEB:accu\ctc

Code #4185
SUNSHINE R ORTING SERVICES
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2003 DEC -5 PM 4:35

J. Ames

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

HONORABLE JANET J. BERRY, DISTRICT JUDGE

TERRY JESS DENNIS,

Plaintiff,

Vs.

Case No. CR99P0611

THE STATE OF NEVADA,

Dept No. I

Defendant.

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TRANSCRIPT OF PROCEEDINGS

POST CONVICTION HEARING

December 4, 2003

RENO, NEVADA

REPORTED BY: CORRIE L. WOLDEN, CSR #194, RPR, CP

COMPUTER-ASSISTED TRANSCRIPTION BY: STENOGRAPH-CaseCATalyst

APPEARANCES

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

SCOTT W. EDWARDS, ESQ.
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RENO, NEVADA, THURSDAY, DECEMBER 4, 2003, 1:25 P.M.

-oOo-

THE COURT: This is a continued hearing of the State of Nevada versus Terry Jess Dennis, CR99P0611. The record should reflect that Mr. Dennis is present with his counsel, Mr. Edwards, and Mr. Plater for the State. And, Mr. Dennis, since our last hearing you had a meeting with Dr. Bittker, is that correct?

THE DEFENDANT: Yes.

THE COURT: Okay. And what we are going to do here today, as we talked about before, Mr. Dennis, the Court has received an order from the Nevada Supreme Court directing this Court to do certain things, and primarily to make sure that you are competent to make the decisions that you have indicated you want to make, okay, so I'm going to have to ask you a lot of questions, Mr. Dennis, so I appreciate your patience. All right?

First of all, I want to make sure that the State has received the report from Dr. Bittker?

MR. PLATER: I have, Your Honor.

THE COURT: Okay. And, Mr. Edwards, are you satisfied that you had sufficient opportunity to meet with Dr. Bittker and go over this report?

MR. EDWARDS: Yes, Your Honor, and I have met with

Mr. Dennis ior to court today and gon over it as well line-by-line. There are some corrections he mentioned to me that perhaps we could make on the record right now if that would be all right with you.

THE COURT: Okay.

MR. EDWARDS: They relate to what he said to Dr. Bittker and Dr. Bittker included in his history. Your Honor, on page two of Dr. Bittker's report under Relevant History, the caption, the last sentence of that first paragraph says, "But does report that biological mother and her relatives were heavily involved in alcohol and drug abuse."

Mr. Dennis relates to me that he has no recollection of saying that to Dr. Bittker and nor does he have any recollection or knowledge about that heavy use of alcohol or drug abuse by the relatives of his biological mother.

Similarly, two more paragraphs down in the last sentence, there is reference to the fact that Mr. Dennis was frequently beaten in school by his teachers, and Mr. Dennis relates to me that it was not frequent. If anything, it was isolated and it occurred not often at all.

THE COURT: So we will change that word to infrequently?

MR. EDWARDS: Infrequently or isolated.

THE DEFENDANT: Once.

TI COURT: One time. All rig . Well, Mr. Dennis, that is what we want to know. You were beaten one time by your school teacher?

THE DEFENDANT: A teacher.

THE COURT: A teacher, okay.

MR. EDWARDS: On page three, Your Honor, the third full paragraph on that page indicates he attained a rank of Specialist 3 in the Air Force. Mr. Dennis indicates to me that is not correct, and as far as he knows there is no such designation in the Air Force.

THE COURT: Okay.

MR. EDWARDS: Two paragraphs down in the paragraph that begins, "In South Dakota he was arrested for what was to be a series of substance and alcohol-related offenses," Mr. Dennis reports to me that it is inaccurate in at least where they occurred. They did not occur in South Dakota, and I believe the criminal history as reported in other documentation speaks for itself in that regard.

On page five, Your Honor, at the very top --

THE COURT: Page five?

MR. EDWARDS: Yes, Your Honor.

THE COURT: Okay.

MR. EDWARDS: Page five of the report at the very top, the last sentence of that continuing paragraph indicates that Mr. Dennis acknowledges occasional auditory and visual

hallucinations, and Mr. Dennis reports to me that he denies saying that and denies experiencing such hallucinations.

With those corrections, Your Honor, I would move for admission of this report, and I would note for the record that I have also had marked as exhibits the materials that I provided to Dr. Bittker in which he relied upon in reviewing before he met with Mr. Dennis and in writing his report and they are set forth in those two volumes with your clerk. I have provided a copy of those to Mr. Plater.

And I would note additionally that not included in that material were videotapes of Mr. Dennis' conversations with police at the time of his arrest, and Dr. Bittker did, in fact, review one of those videotapes. And also not included there, Your Honor, are the medical records from the Nevada State Prison, although you will see in the report Dr. Bittker was given access to those materials and did, in fact, review the medication presently being administered and what has been administered in the prison to Mr. Dennis.

THE COURT: Okay. You are moving to admit these records, is that correct?

MR. EDWARDS: Yes, Your Honor.

THE COURT: Any objection, Mr. Plater?

MR. PLATER: No, Your Honor.

THE COURT: Those will be marked and admitted and made part of the file.

THE CLERK: Your Honor, I have not marked Dr. Bittker's report yet.

THE COURT: You can keep that. What I will do is I'm going to allow her to mark this one that was provided to the Court.

MR. EDWARDS: Very good, Your Honor.

THE COURT: And I want to advise counsel that as we have gone through this report I have made notations of what Mr. Dennis denies or has corrected, denied saying, like one beating occurred rather than frequent beatings by the school teacher. The corrections that have been previously noted are written on this report. Is there any objection to that?

MR. EDWARDS: No objection, Your Honor.

MR. PLATER: No.

THE CLERK: Exhibits 1, 2 and 3.

(Exhibits 1 - 3 were marked and admitted into evidence.)

THE COURT: Any other corrections, Mr. Edwards?

MR. EDWARDS: No, Your Honor.

Your Honor, just so we are on the same page here, it is my understanding what we are doing today is complying with the Nevada Supreme Court's order, and essentially I read that order requiring three things. First of all, you to address the representation of Mr. Dennis, and that was done at a prior

hearing, and secondly, to determine his competency to make a decision to withdraw his appeal and forego further litigation. And, finally, whether that waiver of appeal is knowingly and voluntarily made.

And so I am, as counsel, I am aware of what I have to do here as two ethical duties, essentially to respect his desires regarding the objectives of litigation, meaning termination of his appeals, and on the other hand to represent him and to act in his best interests, so I'm in a bit of a moral and ethical quandary, but I think the way I have decided to address it and after studying the law and deliberating upon this, I think the best approach is to make sure that the record is made regarding the facts that have now been developed regarding his competency and the legal standard that must be applied to determining his competency.

And I say that, because when I bring up an issue about what Dr. Bittker may or may not have said in his report, I'm not saying it because I'm disregarding Mr. Dennis' stated objective, but because I think I have a duty to this tribunal to represent the law as it is and the facts as what we have here, so with that I would like to point to one issue that I think is apparent in Dr. Bittker's findings and evaluation for your consideration, and it arises on page eight of the Court ordered evaluation report. Under the four headings addressing the questions of the Court, there begins a paragraph, "Having

acknowledg. all of the above --"

THE COURT: Okay.

MR. EDWARDS: And the second sentence of that paragraph states, "I believe, with a reasonable degree of medical certainty, that the Defendant's desire to both seek the death penalty and to refuse appeals in his behalf are directly a consequence of the suicidal thinking and his chronic depressed state as well as his self-hatred."

Now, the legal standard for determining competency, and our Nevada Supreme Court does not disagree with this, but it was set quite a long time ago in the U.S. Supreme Court in the case of Rees versus Peyton, and the specific language of that opinion was that a Court in an evidentiary hearing has to determine whether the Defendant has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation, or on the other hand whether he is suffering from a mental disease or disorder or defect which may substantially affect his capacity in the premises.

There has also been some further Federal precedent that states an additional inquiry must be made relating to the rationality of the decision to withdraw appeals, and I have a case here named Rumbaugh versus Procunier, it is a federal case out of the Fifth Circuit, that states, "A court in a proceeding such as this must determine if the person is suffering from a mental disease or defect which does not

prevent hi[illegible]rom understanding his lega[illegible]position and the options available to him, but does affect, but whether that disease or defect nevertheless prevents him from making a rational choice among his options."

And that takes me to that quote from Dr. Bittker's report. In my mind and my reading of that, it seems to implicate that decision, meaning Mr. Dennis has identified -- Dr. Bittker has identified numerous diseases and defects of Mr. Dennis. We see those, the bipolar disorder, the post-traumatic stress disorder, attention deficit disorder, mixed personality disorder with schizoid features, and then, perhaps most importantly, this suicidal thinking and chronically depressed state, and he says that is the motivation for his decision here.

THE COURT: Mr. Edwards, let me ask you, in reading this report, I did not see Dr. Bittker's reference to has Mr. Dennis made any suicide attempts while in prison since he entered his plea of guilty in this case?

MR. EDWARDS: I have not seen any reference to that either, Your Honor, and, no, as far as I'm aware.

THE COURT: These records don't reflect --

MR. EDWARDS: No.

THE COURT: Mr. Dennis, did you advise Dr. Bittker that you felt suicidal or that you have attempted suicide while in prison?

THE DEFENDANT: No, just the opposite, the reverse of that, Your Honor. He asked me and I told him no, I wasn't. I haven't felt suicidal.

THE COURT: And how many times have you attempted suicide?

THE DEFENDANT: You know what, I really don't know, a bunch, going back to 1966.

THE COURT: Okay. But while, since you have been in prison you have not attempted suicide, is that correct?

THE DEFENDANT: No, Your Honor. I have been on medication and, you know, it has pretty much squared me away.

THE COURT: Okay. So the times that you attempted suicide previously were you not on medication?

THE DEFENDANT: Right.

THE COURT: So when you are medicated, you don't, you haven't attempted suicide in the past?

THE DEFENDANT: That's correct. Your Honor, if I may, prior to 1995, I had never been diagnosed with anything or the question of medication never even came up.

THE COURT: So in 1995 you got a diagnosis and that is when you started taking some medicine?

THE DEFENDANT: Correct.

THE COURT: And that is when the suicide attempts stopped?

THE DEFENDANT: Yes, correct.

THE COURT: Okay. Thank you. I just wanted to make, I didn't read in this report that Dr. Bittker said he had suicidal thoughts at the entry of plea, and I know we had previous psychiatric evaluations before the plea was entered. I don't have a recollection of recent allegations of suicide attempt.

MR. EDWARDS: I'm not aware of any either, Your Honor. I have inquired of Mr. Dennis about this very issue several times.

THE COURT: Thank you, Mr. Edwards. You may proceed.

MR. EDWARDS: Your Honor, so this is a legal determination you have to make regarding Mr. Dennis' competency here. That is for you to decide, and this evaluation of Dr. Bittker is evidence for you to consider as well as everything else within your purview here, but it appears from the statement that this medical evidence Dr. Bittker has reviewed may be saying to the Court that Mr. Dennis is making this decision to die and waive his appeals based upon a mental disease or defect, and I think you have to reconcile that with a finding of competency if that is, in fact, what you are going to decide, and we need to address that, because it sticks out here in the record.

If this mental disease and defect is preventing him from making a rational choice among his options, then the legal standard of competency hasn't been met, so that is your

determinati- to make, Your Honor, and then if that is indeed your finding that he is competent, I would like to be heard later regarding the issue of voluntariness of his appeal, waiver, as we begin an inquiry into that.

THE COURT: Okay.

MR. EDWARDS: I think that is the threshold issue. If you could address that finding and that legal standard, I think the due process rights of Mr. Dennis have been respected.

THE COURT: Mr. Plater.

MR. PLATER: Well, Judge, I thought that is why we had the telephone call yesterday. Mr. Edwards could not based on this report and certainly based on his experience or his competence as a lawyer argue to this Court that this gentleman is not competent based on this paragraph that is referenced today.

But aside from that he has referenced the wrong standard, as I understand it. The standard he just referenced was that if a petitioner has a mental disease or defect that would prevent him from intelligently choosing or rationally choosing between alternative choices, then he is not competent.

I'm familiar with that standard as being referenced in the federal cases. That is not what we are here about. The standard of competency in this case was given to

Dr. Bittker and he addressed it. He said that this gentleman understood the proceedings, had a factual understanding of them, and that he had the mental capacity to consult with his lawyer and understand what was going on.

So if we are going to use a different standard and we are going to have somebody come in here and testify to that difference, and we want to make a finding using that different standard, that person has to come in here, he has got to testify, he has got to be under oath, and he has got to be cross-examined.

But I think if you look at that paragraph, I'm not sure what Mr., or Dr. Bittker is saying. I'm not sure what it means when he says the Defendant's desire to both seek the death penalty and to refuse appeals are directly a consequence of the suicidal thinking and his chronic depressed state.

If he is saying Mr. Dennis wants to die because he wants to die, well, I agree. That is what we are here for. He wants to waive his appeals because he wants to die. If he wants to die because he wants to die, there is nothing wrong with that in terms of being a motivation for waiving his appeals.

If he is saying his desire to die is a result of his depression and his suicidal ideation, then I would still argue that does not prevent him from meeting the competency standard that the United States Supreme Court has set forth and the

State of Nevada has adopted and that is whether he has a factual understanding of the proceedings and has the ability to consult with his lawyer.

And, in fact, Dr. Bittker has already found that to be the case, so I guess what we are saying is they are not mutually exclusive ideas. It doesn't offend logic to say he may have some suicidal thinking, he may be depressed, but at the same time he can be competent. Those aren't mutually exclusive ideas.

But I would object that this report even should, at least at this point, should be read to conclude that this man has suicidal thinking. I think your brief canvass with Mr. Dennis at this point and some of the things that he said leads us to believe that he doesn't have suicidal ideation, but I don't know that any of us are competent ourselves to address that at this point, so sorry for the long answer.

THE COURT: Thank you, Mr. Plater.

The Court is persuaded that based upon my review of Dr. Bittker's report and based upon my history of working with Mr. Dennis in this case and his previous psychiatric evaluations that he was competent at the time he entered his plea, made a knowing, intelligent, and voluntary plea, and that he is competent to make decisions on his own behalf at this juncture.

Dr. Bittker's report, although interesting, seemed to

address all matters in the alternative, and his reference to the suicidal thinking and chronic depressed state are not supported at least from 1999 forward. There is no record of any suicide attempt by Mr. Dennis since I have come to know Mr. Dennis. Certainly, depression would be a logical condition if one is facing the death penalty and death row.

But what is somewhat troublesome to the Court is Dr. Bittker seems to engage in an intellectual dialogue within this document of making alternative statements and global statements that date back to Mr. Dennis' childhood. The issue before the Court is to determine whether Mr. Dennis is competent at this juncture. He has already, the Court previously found him competent to enter a plea in 1999. We are now in 2004.

Now, and the record, I need to digress, because the record should also reflect that the Court met with counsel in a telephone conference yesterday to advise counsel that I had received the report, I had read the report, and I requested Mr. Edwards to provide this written report to Mr. Dennis so that he could read it and address any concerns as he has already done, make any corrections, add any information, delete any information, whatever his concerns were.

And, likewise, after reading the report the Court indicated it was satisfied with the content of the report and did not feel compelled to ask questions of Dr. Bittker, but

instructed, but advised both the State and the defense if they wanted to question Dr. Bittker further, or if Mr. Dennis wanted Dr. Bittker here, then he could be here.

And, Mr. Dennis, I don't know how much communication you have had with Mr. Edwards, is it your preference, sir, would you like to have Dr. Bittker called as a witness here today?

THE DEFENDANT: I don't think it is necessary, Your Honor.

THE COURT: Okay. So I wanted to make sure that that got on the record. As to Dr. Bittker's report, the Court is going to attach Exhibit 3 as an attachment to the Court's findings of fact and conclusions of law when this goes to the Supreme Court, but the Court is persuaded that pursuant to Nevada law the Defendant has the sufficient ability to understand the nature of these proceedings, to assist in making rational and competent decisions regarding his right, his appellate rights and his right to pursue a writ in this case and that he is competent to make those decisions based upon the Court's global understanding of this case, the Court's previous involvement with the plea in this case of Mr. Dennis, and the many hearings that the Court has conducted with Mr. Dennis.

And, also, although Dr. Bittker expresses concerns that -- well, again, on page eight Dr. Bittker says the

following. He makes the following findings. "The Defendant does have sufficient present ability to consult with his attorney with a reasonable degree of factual understanding." Dr. Bittker's goes on to state, "The Defendant has a rational and factual understanding of the proceedings. He is fully aware of the charges that he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty. He is also aware of the legal options available to him and the consequences of his not proceeding with these options." And when Dr. Bittker references options, he must be referencing the appeal and the writ process, but it is not clear in his report.

Dr. Bittker goes on to state, "The Defendant is currently taking medications that are reasonable and consistent with the diagnosis of Bipolar Disorder, and his primary psychiatric problems, alcohol, amphetamine, and cocaine dependence, are contained by virtue of the total institutional control in his life."

And, finally, Dr. Bittker states, "The medications that he is taking are not having any unusual effect on the Defendant's ability to make decisions in behalf of his own interest and to cooperate with counsel or to participate in the court hearing."

And I believe that was an issue of concern to the Court because of some comments made by Ms. Butko at a previous

hearing. The Court is persuaded based upon those findings that Mr. Dennis is competent to understand the nature of these proceedings, assist in his own defense, and represent his interests appropriately.

And Mr. Dennis has made it abundantly clear that he does not wish to pursue further appeal or the writ in this case, so for those reasons I accept this report, and I find based upon, again, my understanding of the entire file, my interactions with Mr. Dennis and a review of Dr. Bittker's report that Mr. Dennis is not suffering from a mental disability or defect which precludes him from making an informed decision in this case, assist in his own defense, and understand the nature of these proceedings.

In assessing Dr. Bittker's report, which will be made an exhibit to the Court's order, the Court finds that Mr. Dennis has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding, and the Court further finds that Mr. Dennis has a rational and a factual understanding of these proceedings.

Mr. Dennis, I want to go over a few other things with you. At one point throughout all of the proceedings that we have had, you have consistently, except for on one occasion, said I don't want to have appeals. I don't want to file writs. I don't want anything but the imposition of the death penalty. Is that correct?

THE DEFENDANT: (Nods head).

THE COURT: But on one occasion you did ask Ms. Butko to file a writ on your behalf.

THE DEFENDANT: Okay.

THE COURT: Okay. And she filed a writ and she assigned 33 grounds of errors, or 33 issues that she felt might be a legal basis for you to have further court proceedings, to either be returned for a new penalty hearing, to withdraw your plea to have new proceedings that perhaps could avoid the death penalty. Do you recall that petition?

THE DEFENDANT: Yes.

THE COURT: Okay. And she assigned 33 grounds for that writ. And the Supreme Court expressed concern that the Court had not addressed all of those grounds previously, and so they asked me to first make a finding about your competency, and based upon this evaluation and my review of the record I have already made that finding.

However, Mr. Dennis, I want to give you the chance, if you would like the Court will review all 33 of these grounds to refresh your recollection as to areas where your previous counsel, and Mr. Edwards may join in these arguments, where they are thinking, gosh, Mr. Dennis, here are 33 ideas for you about how we can perhaps get rid of this death penalty, and so my thought process was, Mr. Dennis, that we take a few minutes and go over all of those to remind you of

those and s[illegible] if there is any that you t[illegible]nk maybe should be revisited by your attorney. Any objection to that, Mr. Dennis?

THE DEFENDANT: Do I have a choice?

THE COURT: Sure you do. It is your case.

THE DEFENDANT: Well, I think it would be a waste of time, to tell you the truth. I have read the points. I have read the 33 points, you know, and I have still made this decision. I can't really see what would pop out new now that would alter my way of thinking about this.

THE COURT: Okay. Well, I know, Mr. Dennis, that you think it might be a waste of time, but what I would like to do is just quickly go over those and if anything jumps out at you, if there is something where you say, you know, gosh, I'm not quite sure I remember that one, or maybe I want to rethink my position, I want to refresh your recollection, and then I'm just going to ask you if any of those issues are issues you would like to pursue any post conviction appellate work about. Okay?

THE DEFENDANT: Okay.

THE COURT: Thank you very much, Mr. Dennis, for your patience. Sir, my recollection what I have here on my list is Ms. Butko suggested that your original trial attorney only spent two to three hours with you and was still receiving discovery when you were allowed to plead guilty and that might

be a basis for appeal or a writ.

Number 2, that trial counsel was ineffective for not objecting to aggravating circumstances presented by the State as the prior felonies were not relevant. They weren't murders or they weren't violent crimes and they were remote in time, so your trial counsel maybe should have said no, no, you shouldn't consider those as aggravators.

Number 3, that Ms. Butko felt that the trial attorney should never have allowed you to even plead guilty, because it is, essentially the trial attorney is assisting you in suicide, so the trial attorney should advise you not to plead guilty and should not have supported your decision to plead guilty.

Number 4, the trial attorney deferred critical and material decisions regarding your fundamental constitutional rights. I'm not quite sure what Ms. Butko means by that, but apparently the trial attorney did not meet standards that Ms. Butko thought you were entitled to.

Number 5, facts admitted by Terry Dennis do not amount to a first degree murder. She alleges that there was really no proof or corroboration of your intent to commit first degree murder.

Number 6, the double counting of one aggravating, I guess there was, she contends there was a double counting of aggravators in the case and that was unconstitutional, that

there were two, that apparently her view is that the Court counted aggravators more than once.

Number 7, that the Court and counsel's consideration of your wish to die when you were mentally unstable forms the basis for post conviction relief.

Number 8, the deadly weapon enhancement should be reversed because Ms. Butko alleges you killed the victim with your hands and not the belt and the belt is not inherently dangerous.

Number 9 appears to be sort of a repeat or reiteration of number eight.

Number 10, Ms. Butko alleges the trial counsel failed to prepare and present an adequate defense on your behalf.

Number 11, Ms. Butko alleged that the Court from the three-judge panel considered illegal statements of Terry Dennis.

Number 12, the evidence of a possible spousal battery conviction in the death of a person did not meet constitutional requirements.

Number 13, ineffective assistance of counsel, the counsel's failure to properly investigate possible mitigating factors for the sentencing hearing.

Number 14, allowing Mr. Dennis to plead guilty even though there was a corpus delicti problem.

Number 15, the ineffective cross examination of

Lana Miller failed to demonstrate the true nature of the 1983 conviction and that there were no other crimes of that nature, so she is, again, alleging ineffective trial counsel work.

Number 16, ineffective trial counsel work in that he did not hire independent experts, pathologists or mental health experts to be examined and present testimony.

Number 17, failure to withdraw as counsel in the face of an irreconcilable conflict. I think she means because you chose to plead guilty.

Number 18, the cumulative errors of trial counsel precluded Mr. Dennis from receiving effective counsel, and Ms. Butko believes there should be an evidentiary hearing on the competency of your trial counsel, the attorney who represented you for the entry of plea.

Number 19, she alleges that the three-judge panel were called, Judge Cherry, Judge Memeo and myself, who presided over that panel, Ms. Butko alleges that that is an unconstitutional panel, an illegal methodology of sentencing, and that is the same allegation she makes for number 20.

Number 21, she alleges Mr. Dennis was not competent to formulate intent due to his intoxication. It indicates that Mr. Dennis and the victim had been drinking together and the victim's BAC, or blood alcohol content, was a .37.

Number 22, Ms. Butko alleges that the proceedings allow the State to shift the burden of proof to Mr. Dennis and

trial counsel failed to present sufficient evidence in mitigation.

Number 23, Ms. Butko claimed that Terry Dennis was not competent, and counsel had not had adequate time to work with Mr. Dennis before he entered his plea, and trial counsel could not state unequivocally that their client was competent to understand the nature of the proceedings or assist in his own defense or assist in presenting testimony and evidence at the plea, at the sentencing hearing.

Number 24 indicates that the Court erred when the three-judge panel excluded Lana Miller's testimony.

Number 25, Ms. Butko alleges that your constitutional rights were not protected because trial counsel failed to thoroughly canvass a person, failed to thoroughly have you canvassed alleging you were clinically depressed, that you had been deprived of proper medications, and that you were operating on a death wish, that your trial counsel should have alerted the three-judge panel and vigorously argued that you were not competent to enter your plea at the time you did.

Number 26, that trial counsel failed to provide adequate arguments of proportionality in relation to the crime of which you were charged.

Number 27, she assigns error to the prosecution for misconduct in describing Mr. Dennis as a serial killer. Comments unfairly prejudiced Mr. Dennis before the sentencing

panel.

Number 28, Ms. Butko alleges Nevada Revised Statute 200.033(2) is unconstitutionally vague in regards to the use of prior felonies as aggravators.

Number 29, she assigns ineffective appellate counsel. On appeal, counsel only raised one issue in the case and so she assigns error to your appellate counsel.

Number 30, ineffective appellate counsel, in that apparently there was a reference to petitioner as a serial killer.

And then the three additional assignments of error in the supplemental petition were a reiteration that the three-judge panel was unconstitutional and that relates to the Ring versus Arizona case which we have set this case out because that decision was coming down.

Number two, the imposition, imposing a conviction and sentence for a capital offense by a judge who is subject to popular election is unconstitutional. And as you may be aware, Mr. Dennis, the three judges who were seated on this panel, we all run for election every six years and the three judges were from different districts within the state; Judge Cherry from Las Vegas, Judge Memeo, I think he is from Elko.

And, finally, that trial counsel failed to provide effective assistance of counsel by allowing you, Mr. Dennis, to make tactical choices as to the conduct of the litigation,

that the attorney shouldn't have let you make decisions that were not in your best interest, such as entering a guilty plea on a death penalty waiving your right to have a jury decide your fate, and you specifically request, you requested the three-judge panel even though we had a very lengthy discussion previously where I explained to you that was a bad plan, that you would be better off having a jury do that and advised you that three-judge panels impose the death penalty more frequently than a jury in a penalty phase, and you chose the three-judge panel.

Those are the assignments of error that were brought on your behalf, and I know you indicated to me that, Mr. Dennis, you read all of those documents and all of those assignments of error in their entirety, is that correct?

THE DEFENDANT: Yes.

THE COURT: Mr. Dennis, after the Court has refreshed your recollection as to all of those issues that are potential areas where your lawyers could be fighting to avoid the death penalty, to overturn your conviction, or to provide a new basis upon which to perhaps revisit your case by some other court, do you wish to give up your right to pursue any or all of these assignments of error?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: Would you tell me about that, Mr. Dennis? Tell me your views on what you want to happen in this case.

THE DEFENDANT: Well, I'm not sure what the process is step by step, but in the end without, without getting into a biblical standard of an eye for an eye or anything like that, basically, I took a life and I'm ready to pay for that with mine.

THE COURT: And, Mr. Dennis, I know we have talked about this before, but you understand that although you have admitted to and pled guilty to taking a life and you indicated you want to give up your life, or you want to accept the imposition of the death penalty, you do understand that through the efforts of Mr. Edwards, who is now your attorney, and the previous efforts of Ms. Butko, that there may be certain legal issues that could afford you an opportunity to avoid the death penalty, to not have that happen, and do you understand, sir, that by giving up your right to have further hearings or pursue further appeals that the death penalty will be imposed?

THE DEFENDANT: Yes, Your Honor, I understand that.

THE COURT: And is that what you want to occur?

THE DEFENDANT: Yes.

THE COURT: All right. And you understand we have gone over all of these grounds, these legal grounds, and you understand, sir, that you are entitled to have a hearing on many of those issues, and do you want to give up that right to have that hearing?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: And you also understand, Mr. Dennis, that at the end of the day you could still have all of these rights, you could still have all of the legal proceedings, which would afford your attorneys in the criminal justice system an opportunity to make sure that there were no mistakes, that Mr. Dennis has had, every legal right that Mr. Dennis is entitled to has been given to him, and after looking at all of those appellate issues, the penalty might still be imposed. It would just be delayed while your attorney, Mr. Edwards, is given an opportunity to look at all of these things and make sure that everything was done correctly on your behalf.

And what I want to know from you, do you want to give up all of that opportunity and just not have any more legal hearings and have your sentence imposed?

THE DEFENDANT: Yes, Your Honor, that is what I want.

THE COURT: And you are absolutely sure about that?

THE DEFENDANT: Yes, ma'am.

THE COURT: And have you had enough time in your view to speak with Mr. Edwards and talk about all of those things? You laugh, so it sort of suggests that maybe you have had enough time, but you tell me.

THE DEFENDANT: Yeah, we have spent beau-coup time talking about this. Between him and Karla they about browbeat

me to death, but, no, I'm staunch in my decision.

THE COURT: And I do know, Mr. Dennis, that you have been very firm throughout almost all of the proceedings I have had with you. Are you satisfied that Mr. Edwards and Ms. Butko have had enough time to browbeat you, they have gone over everything with you, they have given you, you got to read all of the documents, you got to talk to Dr. Bittker, is there any other, any other information you think might help you make a decision in this case?

THE DEFENDANT: Barring a visit from an angel, no.

THE COURT: Okay. And, Mr. Dennis, you know how to read and write, correct?

THE DEFENDANT: Yes.

THE COURT: You have read everything. And you, and has anybody threatened you, made any promises to you or threatened you in any way to attempt to get you to say we don't want you to take any more appeals, we don't want you to do anything else?

THE DEFENDANT: No, no, Your Honor.

THE COURT: And you understand, sir, that if you give up your right to pursue your writ, if you give up your right to pursue any and all legal proceedings that could avoid the penalty of death that that can be irreversible?

THE DEFENDANT: I understand.

THE COURT: And do you understand that there are

certain filing requirements and rules that have to be followed, and Mr. Edwards and Ms. Butko have done that on your behalf with the filing of the writ? Bless you.

THE DEFENDANT: (Nods head).

THE COURT: You understand that they have done everything that they can do to keep your legal options open?

THE DEFENDANT: Yes, yes.

THE COURT: All right, sir.

MR. EDWARDS: Your Honor, can I supplement your questions with a few of my own just for the record?

THE COURT: You may.

MR. EDWARDS: Mr. Dennis, you understand that this may be the last time that your words, your testimony becomes a matter of record, so this is the time to speak right now if there is anything to say about this issue of wanting to die. Do you understand that?

THE DEFENDANT: Yeah, I understand that.

MR. EDWARDS: Are you choosing to give up your appeals because you are unhappy with the conditions in prison?

MR. PLATER: Well, Judge, I don't know that is a proper inquiry.

MR. EDWARDS: Oh, sure it is, Your Honor. It relates to whether he has been coerced by conditions in the prison to forego his appeals. There is plenty of cases about that.

THE COURT: I will allow him to answer it. I have

already asked him if he has had any promises or threats. That is a fair follow-up question.

THE DEFENDANT: I don't -- no, the conditions aren't any worse than one would expect.

MR. EDWARDS: And you realize that the State has no interest at this point before your appeals have been decided to execute you?

THE DEFENDANT: I don't know about that, but I don't know what to say about that.

MR. EDWARDS: How about what changed in your mind between the time that you decided to go forward with the habeas petition and now where you have decided to forego your appeals? What change took place in you?

THE DEFENDANT: Basically, it goes back to the question that Judge Cherry asked me during his canvass, I don't know if it was the sentencing or the other part, but I would rather not live than to continue to live and be a doddering old man in prison. It is --

MR. EDWARDS: Why, please don't take offense to this, but if your desire is to kill yourself or to die, why have you not attempted it while you have been in prison?

MR. PLATER: Judge, I'm going to object, because Mr. Edwards is appointed to represent him and to help him determine whether he is competent before the Court. My sense is the question is starting to lean towards an argumentative

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tone as to that decision. That is not his role as I understand it as his lawyer at this point.

THE COURT: I will allow Mr. Dennis to answer it if he so chooses.

THE DEFENDANT: What was the question?

THE COURT: I think it was why you haven't attempted suicide in prison or tried to kill yourself in prison if you want to die?

THE DEFENDANT: The only time I had, I had what the doctor calls suicidal ideation was usually behind alcohol, and I don't have a whole lot of problems when I'm not drinking. If you go back through my record you will see that booze has been a problem in everything I have ever, you know, my whole record. Suicide is not, I don't know, to me it ought to be obvious. If I haven't tried suicide since I have been in prison, why then should that become an issue now, you know. I don't get it.

THE COURT: Thank you, Mr. Dennis.

MR. EDWARDS: Thank you, Your Honor. I have no further questions.

THE COURT: Mr. Plater, did you wish to supplement?

MR. PLATER: Your Honor, I would ask you to ask Mr. Dennis, I know you found him competent based on the global circumstances of the case and especially based on the report that Dr. Bittker has given us, I wonder if you might ask

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Mr. Dennis today if he continues to have a rational understanding of this proceeding, if he understands what is going on, if he has any questions whatsoever, and whether he continues to have the ability to consult with his lawyer.

THE COURT: Mr. Dennis, let's see, you saw Dr. Bittker, the record should reflect that he prepared -- did he see you on November 24th, is that when you met?

THE DEFENDANT: I'm not sure of the date, but that sounds about right.

MR. EDWARDS: If that was Monday, Your Honor, that would be the date.

THE COURT: Yes, Monday, November 24th, apparently you met with Dr. Bittker and the record should reflect that he reviewed approximately 11 or 12 different records and items and sections of documents, and concluded that you had a rational and factual understanding of the proceedings and could understand, could participate in these proceedings with your attorney.

Since that date, from November 24th as of today's date, do you understand what we have been discussing here today?

THE DEFENDANT: Yes, I do.

THE COURT: And are you hearing any voices other than mine?

THE DEFENDANT: Well, Scott's and the prosecutor's.

No, Your Honor.

THE COURT: One at a time. Are you having any auditory or visual hallucinations today?

THE DEFENDANT: No, Your Honor.

THE COURT: And have you been receiving your medications as prescribed at the prison?

THE DEFENDANT: At the prison, yes.

THE COURT: Okay. And were you given your medications in the last 24 hours?

THE DEFENDANT: No, Your Honor.

THE COURT: When was the last time you received your medications?

THE DEFENDANT: The night before last.

THE COURT: Okay.

THE DEFENDANT: But there is a residual, you know. It is not something if you just stop taking it, it is going to automatically make you go nuts.

THE COURT: Okay. And so you feel that you are competent to understand our discussions here today?

THE DEFENDANT: Yes, Your Honor, I do.

THE COURT: And the record should reflect the Court, again, I have had a number of hearings with Mr. Dennis. I believe our interactions appear at least to the Court to be the same as they have been in previous visits or hearings that we have had.

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One of the most important things that you have to understand today, Mr. Dennis, is you have to comprehend the ramifications of your decision. If you are saying to Mr. Edwards do not pursue this petition that Karla Butko filed with 33 assignments of error, do not do anything that would pursue any legal options for me, you understand in so doing that you are giving up those rights that are valuable legal rights that you are entitled to as a petitioner and as a defendant in a criminal justice system?

THE DEFENDANT: I understand that, yes.

THE COURT: And you understand these are constitutional protections that are afforded all prisoners. And I know you are on death row, correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: And so then there are a number of prisoners I'm sure you interacted with who are filing legal documents and doing things, because those are their precious, valuable constitutional rights, so your decision here today to give up those very important rights has significant consequences. Do you understand that?

THE DEFENDANT: Only to myself.

THE COURT: Correct, to yourself. We are not giving up anybody else's rights here today, Mr. Dennis, but it is just very important that you comprehend that this decision today is a very, very important one, and I want to make sure

ER 1640

that you feel you have had sufficient time to make that decision. Is there anything else that you feel you need to do before making this very important decision?

THE DEFENDANT: No.

THE COURT: Okay. You understand, sir, that the effect of the withdrawal of your appeal will give up all lifesaving litigation and if you withdraw your appeal and your writ that you cannot thereafter seek reinstatement of your appeal or your writ and that any issues that you, that could have been brought in this appeal or on your writ are forever waived and the death sentence would presumably be carried out without further delay or intervention?

THE DEFENDANT: I understand.

THE COURT: And understanding that, Mr. Dennis, do you still wish to give up all of your rights to lifesaving potential litigation that Mr. Edwards can bring on your behalf?

THE DEFENDANT: I do.

THE COURT: Any supplemental questions from Mr. Edwards or Mr. Plater?

MR. PLATER: I have none, Your Honor.

MR. EDWARDS: No, Your Honor.

Your Honor, in our telephonic conference yesterday we had occasion to discuss a case Comer versus Stewart that relates to one of the issues that Mr. Dennis had presented to

ER 1641

this Court in his habeas petition regarding the Ring decision of the three-judge panel, and in the order filed in that case in the Ninth Circuit there was some language that I think maybe Mr. Dennis should be aware of.

Whether or not it comes into play at the State level in this case is yet to be seen, I guess, but the language I would like to quote is from that Comer versus Stewart opinion, and it says basically that if Ring is to be applied retroactively, meaning to people who had their case prior to its opinion coming down, the State would not have any interest in executing a person whose death penalty was imposed pursuant to the law prior to Ring, even if that person waived his right to life and even if that waiver was competently and intelligently made.

And that is what we have I think here. We have done the waiver. We have inquired into his competence and yet that issue is still outstanding there, so I don't know whether at the Supreme Court level they will look at this and say we would like to wait and hear on the final determination on the Ring decision before we decide Mr. Dennis' case can go forward or not, but it has been granted certiorari to the U.S. Supreme Court. It was granted on December 1st, Monday, and I have a Westlaw cite for you if it will help.

THE COURT: Please provide that.

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MR. EDWARDS: It is 2003 Westlaw 22327207. And, I

don't know, it doesn't really address anything in the Supreme Court's order why we are here today, but it certainly has some relevance to Mr. Dennis' case. Regardless of what I do or the Nevada Supreme Court does, if the Federal Court somehow has this matter before it, it may take similar type action.

THE COURT: Well, I know in our telephone conference we discussed this particular case coming down and that issue is not before the Court. I believe that is a more appropriate consideration for the Nevada Supreme Court. That is a case that is coming out of the Ninth Circuit. A cert has been granted.

I have not had an opportunity to read the case, but the direction, the very specific directions from our Nevada Supreme Court of what this hearing was scheduled to address, and I don't believe that this Court is in a position to address the circumstances of that particular case; however, I'm going to ask that Mr. Plater draft a proposed order for the Court and allow Mr. Edwards to assist him with that.

The Supreme Court, as you recall, had very specific timelines as to when they want very detailed findings of fact and conclusions of law presented to them, and what we will do is in those findings of fact and conclusions of law I would instruct Mr. Plater to footnote the newest case and make note that this Court did not consider the ramifications or application of that particular case, but addressed the issues

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that the Supreme Court instructed counsel and the Court to abide by.

The Court -- Mr. Dennis, are there any questions that you have regarding your right to appeal and your right to any lifesaving litigation that might assist you in avoiding the death penalty?

THE DEFENDANT: I have no questions, no.

THE COURT: And, Mr. Dennis, is it your view that you want this Court or the Nevada Supreme Court or whatever Court has jurisdiction over your case to impose the penalty of death upon you as soon as possible?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And, Mr. Dennis, are you, you have indicated a number of different reasons, but from what I can understand in our conversations you have referenced an eye for an eye and you say, you have indicated that you are guilty of this crime and you are willing to accept your punishment. Is that a correct view of what you have, your view related to the imposition of the death penalty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Edwards, I know that you had a tremendous amount of time to work with Mr. Dennis, that you and Ms. Butko both have vigorously attempted to get your client to understand that the appellate process and post conviction process is in his best interest. Are you satisfied

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that you nad sufficient time to meet with Mr. Dennis to review all of his legal options and explain those options to him?

MR. EDWARDS: Your Honor, even Mr. Dennis tells you that I'm browbeating him. You know, I would disagree a little bit with that characterization. It has been a lot of communication and a lot of meetings and a lot of studying and consideration of, I think this is a very unique position to be in, both him and I, and I don't know what more I can do until I'm given authority from him about the objectives of litigation, meaning to pursue something further.

Going any farther than I have today I think would violate my ethical duties in this case, so, yes, I have met with him many times and, yes, I have discussed this to the nth degree with him and I have looked at the law. I have consulted people with more expertise in matters relating to both psychiatry and the law in the death penalty arena, and I do not think there is anything more I can present to this Court on his behalf.

THE COURT: Thank you, Mr. Edwards. Mr. Dennis, it is, the Court finds that you made a knowing, voluntary and intelligent waiver of your rights. The Court concludes that you have full comprehension of the ramifications of the decisions that you are making. The Court will accept those decisions.

The Court is satisfied that both your previous

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counsel, Ms. Butko, and your current counsel, Mr. Edwards, have attempted to dissuade you from your decision. They stand prepared and have stood prepared to represent you vigorously in any lifesaving litigation that they might file with any court on your behalf.

It will be the order of the Court that Mr. Edwards remain your counsel throughout these proceedings, and if your views related to any lifesaving litigation changes, Mr. Edwards will remain your counsel and you may contact him at any time. However, as we discussed, in foregoing these appeals, in foregoing the process of post conviction relief, it may and will affect your legal status and options that counsel might have in the future, so that is why this hearing is very, very important and I want to make sure that you have no questions, no concerns, or if you want to rethink your position in any way. I have done just about everything I can to talk you out of this, Mr. Dennis.

THE DEFENDANT: I know you have.

THE COURT: I want to give you every opportunity to, again, the Constitution is a powerful and important document and there are reasons that all of us need to be held to the highest standards in the criminal justice system, and so that is why we have these processes, but you, this is your case and you likewise have the right to pursue an appeal or give it up.

Deputy, can you release one of his hands, please? I

ER 1646

didn't realize, do you have something in your eye, Mr. Dennis?

THE DEFENDANT: Huh?

THE COURT: Is your eye bothering you?

THE DEFENDANT: Yeah.

THE COURT: You can just keep that off. Thank you. Any additional concerns, any questions, Mr. Dennis?

THE DEFENDANT: No, Your Honor.

Where were we?

THE COURT: Where were we? Mr. Dennis, any questions you have of the Court about your rights or your right to give up your rights?

THE DEFENDANT: No, Your Honor. I think Mr. Edwards has explained about everything he can explain to me and so I'm cool as far as understanding and knowing what my options are and whatnot.

THE COURT: Okay. And you understand that I will -- Mr. Edwards will remain your appointed counsel for any further proceedings --

THE DEFENDANT: All right.

THE COURT: -- or any additional communications you may wish to have with him?

THE DEFENDANT: Right.

THE COURT: All right. Ms. Clerk, I will need that transcribed immediately. Mr. Plater, the timelines from the Supreme Court are that we have to have the findings of fact

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and conclusions of law filed with the Supreme Court by December 22nd, okay, but from the court reporter I would like to get that transcript if it is humanly possible by tomorrow or Monday at the latest.

And, Mr. Plater, I would like a proposed draft. I want a disk and I want Mr. Edwards to look at the proposed draft. And, Mr. Plater, I will need that proposed draft on my desk no later than 4:00 Friday, the 12th. And I would refer counsel to Calambro versus State, 111 Nevada 1019, as well as the Nevada Supreme Court order granting the motion that ordered this hearing and the Supreme Court wanted substantial specificity in the proposed order.

Now, let's see what else do I have? The record should further reflect that Mr. Dennis sought to correct Dr. Bittker's report regarding the criminal history. I have pulled the presentence investigation report and Mr. Dennis is of course correct, he knows his own criminal history. I think somehow Dr. Bittker did not understand.

At page three, second paragraph to the last, there were, there were charges in 1983 in Shelton, Washington, an assault and second degree arson. In December '89, in Paiute County, Idaho, grand theft. March '94, Seattle, Washington, misdemeanor theft. April '94, Seattle, Washington, misdemeanor theft. And then in March '99, the murder charge here. So the South Dakota charges, there was one charge in

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South Dakota on his criminal history in Hot Springs, South Dakota in 1970 and that was possession of marijuana. Is that your recollection?

THE DEFENDANT: That is it, yeah.

THE COURT: Okay. So it appeared that, actually, you know, the substantial majority of your charges were out of the state of Washington, and one in Idaho, and then one in Nevada, and then we have some that were not, there were no dispositions and they don't reflect the state which they were charged. Is that correct?

THE DEFENDANT: That sounds right.

THE COURT: Any additional information you want to provide or corrections to Dr. Bittker's report?

THE DEFENDANT: Your Honor, the mistakes he made in that finding as far as I can see are so, you know, small, they are, they are not going to make a difference about anything. I think he did take a little artistic license with his work-up though.

THE COURT: Well, you know, I guess perhaps it is listening skills or writing skills, but I just wanted to note that the record, the presentence investigation report reflects Mr. Dennis' recollection of his history.

In reviewing the Supreme Court order, Counsel, I did not see any other areas in which the Supreme Court directed this Court to engage in any other evidentiary hearing or any

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other findings. Counsel, anything else you see the Court needs to make part of the record?

MR. EDWARDS: Your Honor, I agree with you. I think the only thing left would have been to address some of those evidentiary hearing issues, but that was only in the event that you did not find a valid waiver of appeal, so that has been obviated by your ruling here today, so I don't think we have anything more to comply with that order.

THE COURT: And in an abundance of caution, I wanted to allow Mr. Dennis the opportunity to know that this Court was prepared to provide a hearing on those issues, what those issues were. And you understood that, correct, Mr. Dennis?

THE DEFENDANT: That's correct.

THE COURT: And you wish to waive your right to appeal and you wish to waive your right to have a hearing on those 33 issues?

THE DEFENDANT: That's correct.

THE COURT: And the Court has accepted his decision he has knowingly, voluntarily, intelligently made understanding the nature and consequences of that decision, so I will ask Mr. Plater and Mr. Edwards to work closely to draft an appropriate opinion. I will make part of my record, I will attach Exhibit 3, Dr. Thomas Bittker's report that was prepared at the request of the Court.

Likewise, we will include Exhibits 1 and 2 which are

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all of the documents and reports that Mr. Edwards provided Dr. Bittker to prepare his report. And, of course, we will incorporate by reference the file in its entirety and everything else that the Court has considered in all of its hearings. Any other matters the Court needs to take up?

MR. EDWARDS: Your Honor, I think it would help if you could give an order to have him transported back to the Nevada State Prison today, and if it is conveyed to the deputies who transported him today, I think that is enough, but Mr. Dennis is a smoker, and, as you know, you can't do that at the jail. It has been a couple days now that he has been there.

THE COURT: Okay. Well, Mr. Dennis, I have never been a smoker, but I have a very dear judge friend of mine from South Carolina that has smoked since he was 15 years old, and I know how he gets when he can't smoke a cigarette, so I understand. So, deputies, can we get him back to NSP today?

THE DEPUTY: Yeah, Your Honor, we can take him.

THE COURT: Okay. Thank you very much. We will get that taken care of, Mr. Dennis. And, Mr. Dennis, again, I wanted to, I want the record to reflect that Mr. Edwards remains your counsel, so if you have any questions, concerns, or issues, you may contact Mr. Edwards and he will assist you in addressing those issues.

Anything else, Mr. Dennis, you want to make part of

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this record so the Nevada Supreme Court knows exactly what you want done?

THE DEFENDANT: I can't think of anything else to add, Your Honor.

THE COURT: Okay. Thank you very much, Mr. Dennis. Thank you, counsel, and I will await that order. And, again, Mr. Plater, pay particular attention to what the Supreme Court wants. And then also, Ms. Clerk, if you would make a note Exhibit 1 is attached to the findings of fact and conclusions of law. And, Mr. Edwards, I don't know where the original Dr. Bittker report is, but that should likewise be made part of the record filed in.

MR. EDWARDS: Your Honor, I have paper that looks like it is the original, but I don't think it is either. I thought he might have mailed it to you.

THE COURT: My secretary may have it, but I just want to make sure that the Court Clerk understands the original report needs to be filed in and made part of the record, because I made notes on the faxed one that you sent over so I could prepare for the hearing, and that is Exhibit 1. Okay?

MR. EDWARDS: Very good, Your Honor.

THE COURT: All right. Thank you very much for your able work. Counsel, we will stand in recess.

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ER 1652

STATE OF NEVADA)
) Ss.
WASHOE COUNTY)

I, CORRIE L. WOLDEN, an Official Reporter of the Second Judicial District Court of the State of Nevada, in and for Washoe County, DO HEREBY CERTIFY;

That I was present in Department No. I of the above-entitled Court on December 4, 2003, and took verbatim stenotype notes of the proceedings had upon the matter captioned within, and thereafter transcribed them into typewriting as herein appears;

That the foregoing transcript, consisting of pages 1 through 48, is a full, true and correct transcription of my stenotype notes of said proceedings.

DATED: At Reno, Nevada, this 5th day of December, 2003.

Corrie L. Wolden

CORRIE L. WOLDEN, CSR #194, RPR, CP

ER 1653

CODE 3370

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

TERRY JESS DENNIS,

Petitioner,

VS.

STATE OF NEVADA,

Respondent.

Case No. CR99P0611

Dept. No. 1

ORDER

On December 4, 2003, this court conducted a hearing pursuant to the Nevada Supreme Court's order of October 22, 2003. The Court was directed to determine Dennis' competence and the validity of his waiver of appeal of this court's order of June 4, 2003, dismissing his post-conviction petition for writ of habeas corpus. The Court has considered the testimony and evidence adduced at the hearing, as well as the entire file and all other evidence presented throughout the multiple proceedings associated with this case. Pursuant to the Nevada Supreme Court order of previous date, the court renders the following findings of fact and conclusions of law:

1. On March 29, 1999, the State filed an Information charging Dennis with one count of first-degree murder with the use of a deadly weapon. On April 14, 1999, the State filed a notice of intent to seek the death penalty against Dennis. Maizie Pusich of the Washoe County Public Defender's Office was appointed to represent Dennis.
2. On April 16, 1999, Dennis pled guilty to first-degree murder with the use of a deadly weapon pursuant to a written plea agreement. A psychiatrist conducted a competency evaluation before

Dennis entered his plea of guilty. The psychiatrist concluded that, although Dennis was clinically depressed, he was competent to stand trail and assist in his own defense. *See Dennis v. State*, 116 Nev. 1075, 1079, 13 P.3d 434, 437 (2000). During the plea canvass, Dennis told this court he had served two previous prison terms, that he did not consider living in prison to be "'living at all[]'" and that he did not want to "'waste away'" in prison for the remainder of his life, and wanted to "'get it over faster than that.'" *Id.* at 1080, 13 P.3d at 437.

3. This court found Dennis competent to enter a plea and found his plea was knowing, intelligent, and voluntary. *Id.* Dennis was canvassed by the court about his right to have a jury preside over the imposition of sentence, and was told he would statistically have a better opportunity of obtaining a sentence other than the death penalty from a jury rather than a three-judge panel. Dennis knowingly, voluntarily and intelligently waived his right to a penalty hearing before a jury and requested sentence be imposed by a three judge panel. November 17, 2003, Hearing, 30:12-32:8. A penalty hearing was conducted before a three-judge panel. *See Dennis v. State*, 116 Nev. at 1079, 13 P.3d at 437. Dennis told the panel he did not want to live in prison for the rest of his life. *Id.* Although Dennis agreed to permit his counsel to argue for a sentence less than death and submit a sentencing memorandum with medical, psychiatric and jail records, Dennis refused to present any additional evidence in mitigation or make any further statement in allocution. *Id.* The three-judge panel ultimately found that Dennis made a knowing and voluntary waiver of his right to present further mitigating evidence or make any further statement in allocution. *Id.* at 1081, 13 P.3d at 438. The three-judge panel considered the evidence, testimony, and argument of counsel. The panel deliberated and ultimately returned a verdict of death. *Id.*

4. On appeal, the Nevada Supreme Court found that "Dennis committed a calculated, cold-blooded and unprovoked killing and has a propensity toward violent behavior." *Id.* at 1087, 13 P.3d at 442. The court determined that "the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor, and the sentence of death is not excessive, considering Dennis and his crime." *Id.*

5. On April 10, 2001, Dennis filed a petition for writ of habeas corpus (post-conviction). On June 4, 2003, pursuant to the State's motion to dismiss, this court dismissed the petition. Dennis filed a notice of appeal on June 25, 2003.

6. Before counsel for Dennis filed an opening brief in the Nevada Supreme Court, Dennis wrote a letter, dated September 9, 2003, to this court, expressing his desire to withdraw his appeal. In another letter, dated September 17, 2003, Dennis told the Washoe County District Attorney he wanted to withdraw his appeal. On October 22, 2003, the Nevada Supreme Court, pursuant to the State's motion, remanded the case to this court to determine Dennis' competence and the validity of his waiver of appeal.

7. On November 7, 2003, Dennis' counsel, Karla Butko, filed a motion to be relieved as counsel for Dennis. Butko alleged that Dennis' desire to waive his appeal and proceed to execution was so repugnant to her that she could no longer represent Dennis. On November 17, 2003, this court granted Butko's motion, and appointed Scott Edwards to represent Dennis who is familiar with the case and had been assisting Butko with the appeal. On November 17, 2003, Dennis told this court he wished to waive his appeal and proceed to execution. The court, however, ordered Dennis to undergo a psychiatric evaluation to determine his competency to waive his appeal.

8. On November 24, 2002, Dr. Thomas Bittker, a psychiatrist evaluated Dennis, and submitted a written evaluation to this court. Counsel for Dennis made arrangement for Dr. Bittkerto evaluate Dennis. Counsel provided Bittker with the medical and psychiatric records previously presented to this court at sentencing. Dr. Bittker found Dennis "does have sufficient present ability to consult with his attorney with a reasonable degree of factual understanding." Dr. Bittker also found that Dennis "has a rational and factual understanding of the proceedings [and] ... is fully aware of the charges that he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty." Dr. Bittker found that Dennis "is also aware of the legal options available to him and the consequences of his not proceeding with these options." Dr. Bittker concluded Dennis "is currently taking medications that are reasonable and consistent with the diagnosis of Bipolar Disorder, and his primary psychiatric problems, alcohol, amphetamine, and cocaine dependence, are contained by virtue of the total institutional control

in his life." Finally, Dr. Bittker found "[t]he medications he is taking are not having any unusual effect on the defendant's ability to make decisions in behalf of his own interest, and to cooperate with counsel or to participate in the court hearing."

9. On December 4, 2003, this court conducted the competency and waiver hearing. Both parties had previously agreed that Dr. Bittker was not a necessary witness at the hearing. Dennis, himself, also agreed that Dr. Bittker was not a necessary witness at the hearing. At the hearing, Dennis indicated the following statements in Dr. Bittker's report were erroneous: (1) relative of Dennis' biological mother were heavily involved with alcohol and drug abuse; (2) Dennis was frequently beaten by his school teachers: (3) Dennis had attained a rank of Specialist 2 in the Air Force; (4) Dennis was arrested in South Dakota for a series of substance and alcohol-related offenses; and (5) Dennis had experienced auditory and visual hallucinations. The court accepts Dennis' representations that the foregoing statements were erroneously reported in Dr. Bittker's report.

10. The Court canvassed Dennis at length and accepts Dennis' representation that since he has been in prison he has not felt suicidal. However, Dr. Bittker notes in his report that Dennis experiences depression and suicidal thinking Dennis disputes this representation. He acknowledges attempted suicide prior to 1995; however, he started taking medication in 1995, and has not attempted suicide since then nor has he made any suicide attempts while in prison. Based on Dr. Bittker's report and all other evidence before the court, the court finds Dennis does not suffer from any disease or mental defect that prevents him from making a rational choice among his various legal options -- including whether to pursue any further litigation that may save his life. The Court finds Dennis is capable of assisting in his own defense and understanding the nature of legal proceedings he may pursue to avoid or delay imposition of the death penalty.

11. Dennis was lucid during the court's canvass, and understood the court's questions and the purpose of the hearing. Dennis answered the court's questions with intelligence and insight. He denied experiencing any auditory or visual hallucinations. Dennis acknowledged receiving his medications as prescribed by the prison. Dennis was given an opportunity to ask questions of the

court regarding his right to appeal and his right to any lifesaving form of relief whereby he might avoid the death penalty.

12. Dennis continues to maintain he wants to die. Dennis states he is "staunch in [his] decision[]" and wants the death penalty imposed against him as soon as possible. He expressly desires to forego his appellate rights or any form of litigation that may result in any legal relief from the imposition of death.[1] Dennis understands that even if he were unsuccessful in any present or future litigation, such litigation might delay imposition of the death penalty. Dennis nevertheless desires to waive even the opportunity of extending his life through continued, albeit possibly unsuccessful, litigation that might delay his execution.

13. Dennis is aware of each and every claim for relief in his petition for writ of habeas corpus, and expressly desires to dismiss the petition and waive his appeal related to the petition. Dennis was advised he can renew his request for a hearing on his petition and the court will order a hearing. Dennis states that he "took a life and I'm ready to pay for that with mine." Dennis understands he has the right to continue with his appeal if he so desires. Dennis understands that by waiving his appeal the death penalty will be imposed. Dennis desires the death sentence he received to be imposed against him.

14. Dennis has had sufficient time to consult with his attorneys regarding his desire to waive all litigation or forms of relief, including his appeal, and to proceed with his death sentence. Dennis understands that his counsel have done everything possible to this point to keep his legal options open for him. Counsel for Dennis have attempted to dissuade Dennis from waiving his appeal; counsel were prepared at all times to represent Dennis in any lifesaving litigation. The court finds, and Dennis personally agrees, there is no other information Dennis requires in order to supplement his decision to forego all litigation on his behalf. Dennis understands that if he continues to pursue his appeal or other forms of relief, his life might be spared.

15. Dennis knows how to read and write. No one has threatened Dennis or made any promise to him in his decision to waive all further litigation. Dennis understands that by waiving his appeal, the

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[1] The Court does not consider the applicability of *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 20003) (holding that *Ring v. Arizona*, 536 U.S. 584 is retroactive on collateral review).

penalty of death is irreversible. Dennis understands that by waiving his appeal, any issues that were or could have been brought in the appeal are forever waived, and that his death would presumably be carried out without further delay or intervention. The Court has ordered Mr. Scott Edwards to continue his representation of Dennis and advised Dennis he may contact Mr. Edwards for any legal advice before imposition of the death penalty.

16. The Court has considered Dr. Bittker's report, Dennis' responses to the court's canvass, and the totality of the circumstances. The court finds Dennis is competent to waive his appeal and any other form of legal relief by any means that might spare his execution. Dennis has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding, and he has a rational and factual understanding of the legal proceedings. The court finds that Dennis has voluntarily, knowingly, and intelligently waived his right to pursue further forms of relief that might save his life, including his right to appeal in CR99P0611, Supreme Court Case No. 41664.

DATED: This 22nd day of December, 2003.

DISTRICT JUDGE

CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of the Second Judicial District Court of the State of Nevada, County of Washoe; that on this 22nd day of December, 2003, I deposited in the County mailing system for postage and mailing with the United States Postal Service in Reno, Nevada, a true copy of the attached document addressed to:

Scott W. Edwards, Esq.
1030 Holcomb Avenue
Reno, NV 89502

Deputy District Attorney Plater
Via Interoffice Mail

Terry Jess Dennis, #61244
NSP
PO Box 607
Carson City, NV 89702

Leona Quilici

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY JESS DENNIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41664

FILED

JAN 13 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DIRECTING CONFIRMATION OF VOLUNTARY WAIVER OF APPEAL

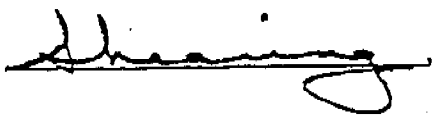
This is an appeal from an order dismissing without an evidentiary hearing a first post-conviction petition for a writ of habeas corpus in a capital case. On September 26, 2003, the State moved this court to remand this appeal to the district court and to suspend the briefing schedule based on letters appellant Terry Jess Dennis had addressed to the district court and the Washoe County District Attorney wherein Dennis expressed his desire to withdraw this appeal. On October 22, 2003, this court granted the State's motion and remanded the case to the district court for a determination of Dennis' competence and the validity of his waiver of appeal.

Pursuant to our order, the district court conducted proceedings to determine Dennis' competence, and ordered a psychiatric evaluation. On December 4, 2003, the district court conducted a hearing on Dennis' competence and waiver of appeal. After a thorough canvass, the court found Dennis competent to waive this appeal and further found that Dennis voluntarily, knowingly and intelligently waived his right to pursue this appeal. The district court entered its written order to that effect on December 22, 2003. The district court clerk timely transmitted to

this court for filing a copy of the transcript of the competency and waiver hearing, as well as a copy of the district court's order.

To date, however, neither appellant nor his counsel has formally moved this court to withdraw this appeal. Accordingly, counsel for Dennis[1] shall have twenty (20) days from the date of this order within which to file a motion in this court pursuant to NRAP 42 confirming Dennis' continued desire to withdraw this appeal. The motion must verify that counsel has informed Dennis of the legal consequences of voluntarily withdrawing this appeal, including that Dennis cannot hereafter seek to reinstate this appeal and that any issues that were or could have been brought in this appeal are forever waived, and that having been so informed, Dennis consents to a voluntary dismissal of this appeal.

It is so ORDERED.

 , C.J.

cc: Karla K. Butko
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick

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[1]It appears that the district court granted attorney Karla K. Butko's request to be relieved as Dennis' counsel and appointed attorney Scott W. Edwards as replacement counsel for the purposes of further proceedings. However, Ms. Butko remains counsel of record in this court subject to a motion to withdraw or substitute counsel. Accordingly, pursuant to NRAP 46(d) and SCR 46, 47 and 48, Mr. Edwards shall have ten (10) days from the date of this order within which to file a motion in this court to substitute as counsel in this appeal.

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

TERRY JESS DENNIS, Appellant, vs. THE STATE OF NEVADA, Respondent.	Case No. 41664

Brief of Federal Public Defender
as Amicus Curiae in Support of Appellant

FRANNY A. FORSMAN
Federal Public Defender
MICHAEL PESCETTA
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, Nevada 89101
(702) 388-6577

Attorneys for Amicus Curiae

TABLE OF AUTHORITIES

I. INTRODUCTION

Terry Jess Dennis is a man who indisputably suffers from mental illness. He seeks to dismiss the pending appeal from denial of habeas corpus relief to be the ninth person executed as a "volunteer" in Nevada, as an alternative to committing suicide himself or to living in prison. His desire to dismiss his appeal is "directly a consequence of the suicidal thinking and his chronic depressed state" that are part of his mental illness. Under the controlling legal principles, this Court cannot acquiesce in Mr. Dennis' attempt, upon which the state seeks to capitalize, to bring about his own destruction. The court must proceed with the litigation of the pending appeal.

II. STATEMENT OF THE CASE AND FACTS

Petitioner-appellant Dennis pleaded guilty to first degree murder in 1999. 1 AA 9, 68.[1] At the penalty hearing, uncontradicted evidence was before the court that Mr. Dennis suffers from mental illness, including bipolar disorder and post-traumatic stress disorder, and that he had a long history of suicide attempts and abuse at the hands of his family. 1 AA 130-136; 2 AA 396-397. It was also undisputed that prior to the homicide for which the death sentence was imposed, Mr. Dennis sought help for his mental disorders, which were making him want to kill a woman. 1 AA 132, 200. The Veteran's Administration admitted him briefly, medicated him, and then "cut him loose." 2 AA 255. Mr. Dennis refused to allow introduction of mitigating evidence beyond his own statements and his mental health records. 2 AA 387, 392-399, 408-409. Despite these facts, the three-judge panel - - not surprisingly, in view of the overwhelming death-proneness of such panels, see Beets v. State, 107 Nev. 957, 977-978, 821 P.2d 1044, 1058-1059 (1991) (Young, J., dissenting) - - obliged Mr. Dennis' wish for self-destruction and imposed a death sentence. 2 AA 476. This Court - - again despite the undisputed evidence of Mr. Dennis' mental illness and of his attempt to get help before the commission of the offense - - upheld the conviction and sentence. Dennis v. State, 116 Nev. 1075, 13 P.3d 434 (2000).

Mr. Dennis then filed a verified petition for writ of habeas corpus. 2 AA 479. The district court ultimately denied all relief and Mr. Dennis appealed. 4 AA 840. Counsel filed an opening brief on appeal on September 16, 2003, Amicus App. 24, raising substantial issues, including the question of the

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[1] Citations to "AA" are to the appellant's appendix citations to "Amicus App." are to the appendix of amicus curiae submitted with this brief.

retroactivity of Ring v. Arizona, 536 U.S. 584 (2002), a question which is pending before the United States Supreme Court. Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003) (en banc) (holding Ring retroactive), cert. granted sub nom. Schriro v. Summerlin, 124 S.Ct. 833 (2003); contra, Colwell v. State, 118 Nev. __, 59 P.3d 463 (2002).

After the notice of appeal was filed, Mr. Dennis wrote to the district court, the district attorney, and this Court, expressing a desire to abandon the appeal in order to be executed. On motion of the state, Amicus App. 60, this Court remanded the case to the district court to determine if Mr. Dennis was competent to decide to withdraw the appeal. Amicus App. 70. This Court instructed the district court to conduct an inquiry into Mr. Dennis' competence to abandon his appeal, and specified that:

> [I]n determining competence, the district court should ascertain (1) whether appellant has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding and (2) whether appellant has a rational and factual understanding of the proceedings.

Order granting motion at 3 (October 22, 2003) (footnote omitted), Amicus App. 72.

On remand, the district court appointed a psychiatrist, Thomas E. Bittker, M.D., to examine Mr. Dennis and furnish a report on his capacity to proceed. The Court directed Dr. Bittker to answer specific questions, but the questions the district court propounded were the standard inquiries made in connection with competence to proceed to trial.[2] The district court did not ask Dr. Bittker to provide an opinion on Mr. Dennis' mental state under the correct standard enunciated in Rees v. Peyton, 384 U.S. 312, 314 (1966) (per curiam), that is whether Mr. Dennis' decision was "substantially affected" by his mental disorder.

Dr. Bittker examined Mr. Dennis on November 24, 2003, reviewed records, interviewed counsel, and prepared a report. Amicus App. 81. Dr. Bittker's report diagnosed Mr. Dennis with bipolar

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[2] The questions the district court posed were:

> The written report shall specifically address: (1) whether Petitioner has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding and (2) whether appellant has a rational and factual understanding of the proceedings. Dr. Bittker shall state in his report any professional opinion he has regarding the Petitioner's competence to waive appeal and forego possibly life-saving litigation. Further, Dr. Bittker shall review all medication taken by Petitioner to evaluate what if any impact said medication has on the Petitioner's state of mind and competence.

Amicus App. 77 (footnote omitted).

disorder, chemical dependency, attention deficit hyperactivity disorder (ADHD), post-traumatic stress syndrome (PTSD), mixed personality disorder with schizoid characteristics, and severe depression. Amicus App. 87-88.[3] Dr. Bittker's report reviewed evidence of a childhood filled with physical and sexual abuse at the hands of Mr. Dennis' adoptive parents. Amicus App. 82-84. Illustrative of Mr. Dennis' disorder is his belief that his arrest as a juvenile was directly responsible for his adoptive father's death. Amicus App. 87. Mr. Dennis' background includes a significant history of poly-substance abuse, including use of amphetamines, cocaine, marijuana, and alcohol. Amicus App. 84. He has sustained "frequent head injuries," but has never received a neuropsychological examination to confirm the extent of his impairment. Dr. Bittker's report states that Mr. Dennis has suffered from auditory and visual hallucinations. Amicus App. 85.[4] After his arrest in the instant offense, Mr. Dennis falsely bragged to the police about "multiple killings" that he allegedly committed. Amicus App. 87.

The psychiatric report also reveals beyond any doubt that Mr. Dennis suffers from a life-long history of suicidal ideation. Dr. Bittker's report notes a significant medical history of "chronic suicidal ideation since [Mr. Dennis] was a child," as well as a history of suicide attempts stretching back to 1966. Amicus App. 85. Mr. Dennis was discharged from military service in Vietnam due to the fact that he was "suicidal," Amicus App. 83; he "had made several attempts to seek admission to the VA Hospital

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[3] Dr. Bittker's report classified Mr. Dennis' mental disorders into the following categories found in the Diagnostic and Statistical Manual of Mental Disorders:

AXIS I:	1) Bipolar Disorder, Type II, 296.89 2) Alcohol Dependence, 303.90 3) Amphetamine Dependence, now in remission, 304.40 4) Cannabis Dependence, 304.30 5) Cocaine Dependence, 304.20 6) Nicotine Dependence, 305.10 7) Posttraumatic Stress Disorder, by history, 309.81 (cardinal signs denied during my interview with the defendant) 8)Attention Deficit/Hyperactivity Type, 314.01 #2 through #5 above in institutional remission.
AXIS II:	Mixed Personality Disorder with Antisocial, Cyclothymic, Borderline, and Schizoid Features, 301.90
AXIS III:	1) Hepatitis C. 2) Psoriasis.
AXIS IV:	Severe. Social isolation, institutionalization, problems with the criminal justice system.
AXIS V:	50/50.

[4] See p. 13, below.

IV. ARGUMENT

A. Standard of Review

This Court must review de novo the district court's conclusion that Mr. Dennis is presently competent to waive his appeal because the ultimate conclusion as to Mr. Dennis' competency to waive his appeal must be made by this Court. Cf. Rees, 384 U.S. at 314 (retaining jurisdiction of petitioner's decision to waive appeal), held without action on petition for cert., 386 U.S. 989 (1967). Additionally, the district court's decision was based in part upon a written report of Mr. Dennis' competency and there is accordingly no need for this Court to give deference to the district court's conclusions as they relate to Dr. Bittker's findings. Therefore, this Court must conduct a de novo review of the conclusions of the district court. See, e.g., Haberstroh v. State, 119 Nev. __, 69 P.3d 676, 683 (2003).

B. The Uncontradicted Expert Evidence that Mr. Dennis' Decision to Waive His Appeal is "Directly a Consequence" of His Mental Illness Establishes that the Waiver is Invalid

1. The District Court Applied an Incorrect Legal Standard on the Issue of Whether Mr. Dennis' Waiver was "Substantially Affected" by His Mental Illness

The standard of competence applicable to Mr. Dennis' purported waiver of his right to appellate review was set forth by the United States Supreme Court in Rees v. Peyton, 384 U.S. 312 (1966) (per curiam). In Rees, the petitioner, who was under sentence of death, sought to withdraw his properly-filed petition for certiorari. Counsel indicated to the court that he could not accede to petitioner's request without obtaining a psychiatric evaluation. The psychiatrist retained by counsel believed petitioner was incompetent, but state-selected psychiatrists expressed doubts that he was insane. The Supreme Court directed the federal district court to conduct a hearing and it held that the issue was:

> [W]hether [petitioner] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises.

Id. at 314 (emphasis added).[8] Thus, in addition to the cognitive "capacity to appreciate his position,"

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[8] The standard imposed by Rees -- whether the litigant's mental illness may "substantially affect his capacity" to "make a rational choice with respect to continuing or abandoning further litigation," id. at 314, is the basis of the Supreme Court's jurisprudence on the issue of standing to appear as a next friend to assert an incapacitated person's right to review on habeas corpus. Whitmore v. Arkansas, 495 U.S. 149, 166 (1990); Demosthenes v. Baal, 495 U.S. 731, 735-736 (1990); Calambro v. District Court, (continued...)

the petitioner must be able to make a "rational choice." Assessment of the rationality of that choice turns on "whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity" to waive the present appeal.

The additional requirement of rational choice denotes more than mere cognitive understanding: therefore, this element requires a different showing than what is required to be competent to stand trial and to plead guilty. Mata v. Johnson, 210 F.3d 324, 329 n.2 (5th Cir. 2000) (distinguishing between competency to stand trial and plead guilty, citing Godinez v. Moran, 509 U.S. 389 (1993), and Dusky v. United States, 362 U.S. 402, 402-403 (1960) (per curiam), and the Rees standard for competency to waive discretionary review). Additionally, the standard for incapacity in Rees is met if there is merely a possibility that petitioner's decision to withdraw his appeal is substantially affected by this mental illness. See Rees, 384 U.S. at 314 (petitioner incompetent if decision "may" be substantially affected by mental disorder).

Under Rees, there can be no reasonable dispute that Mr. Dennis' decision to withdraw the appeal cannot be a "rational choice" because it is "substantially affect[ed]" by his mental illness. Dr. Bittker's report could hardly be clearer: after listing the mental disorders from which Mr. Dennis suffers, Amicus App. 87-88, Dr. Bittker concluded that Mr. Dennis' attempt to waive the appeal is "directly a consequence of the suicidal thinking and his chronic depressed state . . .," Amicus App. 88, and this "strategy springs from his psychiatric disorder . . . ." Amicus App. 89.[9] Dr. Bittker came to this conclusion without even being asked to offer an opinion under the standard of Rees, and thus his expert opinion is all the more persuasive because it did not come in response to any prompting as to the correct legal standard. The evidence before this Court, and its precise fit with the standard prescribed by Rees, makes extended discussion of this point unnecessary: there can be no dispute that a waiver decision that

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[8](...continued)
114 Nev. 961, 971 P.3d 794, 800-801 (1998).

[9] Depression is, of course, one of the characteristics of bipolar disorder (formerly called manic-depressive disorder), as are suicide attempts. See Diagnostic and Statistical Manual of Mental Disorders at 382-383, 392-396 (4th ed. Text Revision 2000). Dr. Bittker's finding is supported by Mr. Dennis' psychiatric history. In 1995, Mr. Dennis referred to his suicide attempts by overdoses of drugs and by carbon monoxide poisoning because "he would prefer to go to sleep than to inflict some violent means upon himself." Amicus App. 8.

is "directly a consequence" of mental illness meets the standard of incompetence under Rees, which requires that the decision be only "substantially affect[ed]" by mental illness. Nothing in the record before the district court, or in the colloquy between the court and Mr. Dennis in the hearing on remand, remotely contradicts Dr. Bittker's finding, which the district court did not address. See Mata v. Johnson, 210 F.3d at 332 (holding that district court violated due process by failing to address psychiatrist's report that was contrary to court's conclusion). Under that standard, this Court must reject the district court's conclusions and order that this appeal proceed.

The erroneous conclusions reached by the district court flow from the error as to the correct legal standard. The questions the district court posed to Dr. Bittker (following this Court's order of October 23, 2003), and which Dr. Bittker's report answered, were the elements for finding competence to stand trial. See, e.g., Dusky v. United States, 362 U.S. 402, 402-403 (1960) (per curiam). The standard for trial competence is not the same as the standard for withdrawing an appeal. See Mata v. Johnson, 210 F.3d at 3291 n.2. The district court's order entirely fails to apply the correct standard. The district court ruled that "Dennis has sufficient present ability to consult with his attorney with a reasonable degree of factual understanding, and he has a rational and factual understanding of the legal proceedings." Amicus App. 144. This is a finding under the Dusky standard, which does not address the Rees standard. Similarly, the court noted that "Dennis does not suffer from any disease or mental defect that prevents him from making a rational choice among his various legal options." Amicus App. 142 (emphasis supplied); see also id. at 102. However, the court did not consider whether Mr. Dennis was suffering from a mental disease that may substantially affect his capacity to make a rational choice. See Rees, 384 U.S. at 314 (emphasis supplied).

By confusing the legal standards, the district court (following the lead given in this Court's order) left its decision without any legal support. E.g., Bergmann v. Boyce, 109 Nev. 670, 676-677, 856 P.3d 560, 563-564 (1993) (district court abuses discretion by applying wrong legal standard); see also Wade v. Terhune, 202 F.3d 1190, 1195 (9th Cir. 2000) (no presumption of correctness to state-court factfindings when incorrect legal standard applied). Due process protections apply in habeas corpus proceedings, e.g., Moran v. McDaniel, 80 F.3d 1261, 1271 (9th Cir. 1996). See Easter v. Endell, 37 F.3d 1343, 1345 (8th Cir. 1994) (state habeas proceedings must satisfy due process standards for procedural

default and specifically to waiver decisions). St. Pierre v. Cowan, 217 F.3d 939, 949 (7th Cir. 2000). The failure of the district court to apply the correct standard of competence to Mr. Dennis' case can result only in a denial of due process, since under the proper standard, Mr. Dennis' waiver is indisputably invalid.

2. The District Court Erred in Ignoring Uncontradicted Expert Evidence that Mr. Dennis' Waiver Decision was "Directly a Consequence" of His Mental Disorders

As shown above, the only expert evidence before the district court, and this Court, on the relevant issue did show that Mr. Dennis' waiver decision was "directly a consequence" of his mental disorders, and thus his decision was "substantially affected" by his mental illness under Rees v. Peyton. The district court simply ignored the uncontradicted finding on this point in Dr. Bittker's report.

The district court clearly erred in failing to address these uncontradicted expert conclusions which are directly contrary to its ruling. See Mata, 210 F.3d at 332 (holding that district court deprived petitioner of due process when it "made no mention of [the psychiatrist's] report and conclusion" that were contrary to its holding); cf. Rumbaugh v. Procunier, 753 F.2d 395, 399-401 (5th Cir. 1985) (district court resolved contradictory findings in psychiatric report by allowing expert the opportunity to explain whether petitioner's mental illness substantially affected his capacity).

Instead, in the hearing the district court relied upon its own lay assumptions, not based on any evidence in the record, to reject Dr. Bittker's relevant findings. The court stated that Dr. Bittker's representations about Mr. Dennis' "suicidal thinking and depressed state are not supported at least from 1999 forward." Amicus App. 105. However, the court did not actually acknowledge the factual basis for Dr. Bittker's conclusions that Mr. Dennis' mental illness does affect his present decision to withdraw his appeal. The court also erred in discounting Dr. Bittker's conclusions about Mr. Dennis' suicidal tendencies "as global statements that date back to Mr. Dennis' childhood." Amicus App. 105. On the contrary, a "global" assessment, which includes evidence from Mr. Dennis' childhood, is critical to an accurate diagnosis as to whether he is presently suffering from suicidal ideation. Indeed, the very definition of a mental disorder in the DSM-IV-TR, includes "a clinically significant behavioral or psychological syndrome or pattern that occurs in an individual . . . ." Id. at xxxi (emphasis supplied).

Similarly, the district court's rejection of Dr. Bittker's finding that Mr. Dennis suffers from a "chronic depressed state" as "not supported" for the period since 1999, Amicus App. 105, is itself

an individual's mental state.

The district court also relied upon its own colloquy with Mr. Dennis as an indication of his competence. Amicus App. 123-126, 129-132, 135. It should go virtually without saying that the observations of lay individuals are particularly likely to yield unreliable assessments of a defendant's mental processes. See Lokos v. Capps, 625 F.2d 1258, 1267 (5th Cir. 1980) ("one need not be catatonic, raving, or frothing, to be unable . . . to relate realistically to the problems of his defense"); Lafferty v. Cook, 949 F.2d 1546, 1555 (10th Cir. 1991) (untrained people often have difficulty recognizing signs of mental illness from defendant's demeanor); see also Miller ex rel. Jones v. Stewart, 231 F.3d 1248, 1254 (9th Cir. 2000) (Fisher, J., concurring) ("crediting [petitioner's] position begs the question of his competence"), stay vacated ,531 U.S. 986 (2000). In addition, the court did not (and did not have the expertise to) consider information that Dr. Bittker was able to gather from Mr. Dennis as far as his affect and other non-verbal indicators when speaking about and answering the doctor's questions relating to his suicidal ideation. For example, Dr. Bittker's report described him as "emotionally distant," and "constricted," and noted that "he appeared on the threshold of tears" at one point in the interview. Amicus App. 85. The district court was also in no position, as a lay person, to evaluate Mr. Dennis' affectless declarations that he "would rather not live than live" and be an old man in prison, and that living in prison is "not living." Amicus App. 121; 1 AA 35; 2 AA 397. An expert could find a striking similarity between those statements and statements Mr. Dennis made when he was actively suicidal. Amicus App. 7 ("' . . . feeling helpless, hopeless and worthless.' 'I just want to be peaceful,' 'I don't know what I'll do,' 'I can't see the point in this anymore.'"), 12 ("nothing to live for"), 13 ("he does not care to live anymore"), 8 ("he would prefer to go to sleep than to inflict some violent means upon himself"), 18 ("cornered and desperate"). In fact, Dr. Bittker's report made the direct correlation between Mr. Dennis' "psychiatric disorder" and his resulting decision that "he wishes to die and he wishes to be certain of a reasonably human death," Amicus App. 89, which is strikingly similar to Mr. Dennis' expressed wish to "go to sleep," when he was actively suicidal in 1995. Amicus App. 8. The fact that Mr. Dennis may appear lucid and rational to a lay observer does nothing to contradict Dr. Bittker's expert findings. That Mr. Dennis' decision - - however persuasively stated by him - - is in fact "directly a consequence" of his mental disorder is not a factual issue within the district court's lay

knowledge, since otherwise the expertise of mental health professionals would be irrelevant.

Further, the district court's reliance on Mr. Dennis' own statements at the remand hearing further reduced the reliability of the hearing itself. Uncritical reliance on the statements of an individual seeking to be executed is particularly problematic when, as here, there is no actual adversary litigation to ferret out inaccuracies. For instance, at Mr. Dennis' request, the court in the remand hearing purported to "correct" Dr. Bittker's report on some issues. Mr. Dennis denied telling Dr. Bittker that he suffered from auditory or visual hallucinations, and denied having them, Amicus App. 94-95, and the court made that "correction." Amicus App. 96, 142. In Mr. Dennis' statement to the police, however, which was before the court, he explicitly asserted that "I get these thoughts and voices telling me to do things and sometimes I listen, sometimes I don't." 2 AA 257 (emphasis supplied). Mr. Dennis' mental health records repeatedly documented his statements that he has had auditory hallucinations. Amicus App. 6 (reporting "voices which tell him to do things he doesn't want to do"), 12, 23.[12]

The district court did not challenge Mr. Dennis' attempt to make himself appear more competent by denigrating the credibility of Dr. Bittker's report on factually inaccurate grounds. Counsel for Mr. Dennis, who explicitly expressed his view that he was unable to argue against Mr. Dennis' competence, Amicus App. 130, did not correct these inaccuracies. The prosecutor - - "the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Lay v. State, 116 Nev. 1185, 1194, 14 P.3d 1256, 1262 (2000), quoting Kyles v. Whitley, 514 U.S. 419, 439-440 (1995), quoting Berger v. United States, 295 U.S. 78, 88 (1935) - - did not correct them either.

The district court also relied on a mental health evaluation of Mr. Dennis by Dr. Lynn that was performed in 1999, in which Dr. Lynn found Mr. Dennis competent under the Dusky standard although he was "clinically depressed." Amicus App. 4. There has been a lapse of almost five years since Mr. Dennis' prior competency evaluation, and the passage of time decreases the probative value of the prior evaluations. See Vargas v. Lambert, 159 F.3d 1161, 1169-70 (9th Cir. 1998); Mata, 210 F.3d at 330;

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[12] Mr. Dennis also claimed not have told Dr. Bittker about, or to have any recollection of, "heavy use of alcohol or drug abuse by the relatives of his biological mother," and the district court noted this "correction." Amicus App. 4, 96, 142. At the plea canvass and in the penalty hearing, however, Mr. Dennis himself represented that there was a history of alcoholism in his biological mother's family. 1 AA 32-33; 2 AA 396-397; Amicus App. 22.

Brewer v. Lewis, 989 F.2d 1021, 1022-1024 (9th Cir. 1993) (district court properly denied next friend standing where no evidence in recent state court proceeding, or presented to district court, showed decision to terminate legal proceedings affected by mental disease, and only evidence presented by next friend was report from psychiatrist who did not examine inmate, which speculated that inmate "may" not be competent). The prior evaluation is a particularly weak indication of Mr. Dennis' current competence because it did not consider the effect of his adjustment to his current confinement situation, see Comer v. Stewart, 215 F.3d 910, 916 (9th Cir. 2000) (collecting cases), nor did it address Mr. Dennis' competence to decide to abandon all litigation in order to be executed. The district court's written questions posed to Dr. Bittker also did not seek any opinion as to the effects of Mr. Dennis' current confinement situation on his mental state, and the doctor's report does not address this issue. Even assuming that it has some relevance, the previous evaluation did not analyze the effect of Mr. Dennis' mental diseases or disorders on the rationality of the decision before this Court, and thus it does not contradict Dr. Bittker's finding that Mr. Dennis' waiver decision is affected by his mental illness. Further, the previous evaluation was concerned with the standard of competence to stand trial or plead guilty, which, as pointed out above, is not the legal standard applicable here. It is axiomatic that the propriety of each waiver of a right must be assessed individually. See Rice v. Olson, 324 U.S. 786, 788-789 (1945) (guilty plea not equivalent to waiver of counsel). The court's reliance on the previous evaluation thus only exacerbated the court's failure to apply the appropriate standard itself.

Thus the hearing on remand presents the classic problems of a non-adversary proceeding: reliance on an incorrect legal standard, reliance on inaccurate evidence not challenged by the parties, and rejection of uncontradicted evidence on no factual basis at all. Thus, neither the district court's order, nor the record created in the district court, nor this Court's one-justice order approving the district court's order and directing the filing of a "voluntary" withdrawal of the appeal without any adversary litigation in this Court, comports with basic standards of due process under the state and federal constitutions or with the reliability guarantee of the Eighth Amendment. The district court's order must therefore be reversed.

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C. The District Court's Decision Does Not Establish that Mr. Dennis' Waiver is Competent, Knowing, Intelligent, and Voluntary

Neither the district court's decision, nor the record before this Court, supports a finding that Mr. Dennis' waiver of his appeal is competent, and knowing, intelligent, and voluntary. The questions expressly posed to Dr. Bittker by the district court were confined to assessing Mr. Dennis' cognitive ability to understand the nature of the proceedings, and the consequences of his decision, and his ability to rationally consult with counsel. The district court's order finding that Mr. Dennis is competent, Amicus App. 142, and its comments in the hearing below, Amicus App. 104-105, show that the court's focus was confined to his cognitive functioning. The district court did not, however, dispute Dr. Bittker's diagnoses of mental disease or his finding that Mr. Dennis' current decision to waive his appeal is a "direct[] consequence" of his illness, Amicus App. 88, and there is no evidence in the record contradicting that diagnosis. Even if Mr. Dennis' cognitive ability would make him competent under the Dusky standard, this conclusion does not alter the force of Dr. Bittker's finding under the Rees standard: however cognitively sophisticated Mr. Dennis may be, if his decision to waive this appeal is "substantially affect[ed]" by his mental illness, he is not competent to waive his appeal.

Additionally, the court did not adequately consider the separate and independent requirement that Mr. Dennis' waiver be knowing, voluntary, and intelligent. Comer v. Stewart, 215 F.3d 910, 917 (9th Cir. 2000) (inquiry into competence distinct from whether waiver is voluntary, knowing and intelligent). "Supreme Court jurisprudence . . . mandates that courts indulge every reasonable presumption against waiver of fundamental constitutional rights." Mata, 210 F.3d at 329 (citing Hodges v. Easton, 106 U.S. 408 (1882), and Johnson v. Zerbst, 304 U.S. 458 (1938)). In this case, the district court treated Dr. Bittker's findings of Mr. Dennis' cognitive competency as equivalent to a finding that his waiver was knowing, voluntary and intelligent. This approach was incorrect as a matter of law because "[t]he presumption was applied in favor of waiver instead of against it." Shafer v. Bowersox, 329 F.3d 637, 650 (8th Cir. 2003). Applying the correct presumption – that Mr. Dennis has not validly waived his right to appeal – leads to the conclusion that the evidence before the district court was clearly insufficient to establish a voluntary waiver by Mr. Dennis.

As explained above, Mr. Dennis' mental disorders preclude a finding that his attempted waiver of his right to appeal is voluntary. See pp. _ above. Dr. Bittker's report concludes that Mr. Dennis' present decision is a "direct[] consequence" of his "suicidal thinking and his chronic depressed state" and that his current "court strategy springs from his psychiatric disorder and his substance abuse disorder . . . ." Amicus App. 88-89. Mr. Dennis' mental disorders and their manifestations (i.e., suicidal ideation) preclude him from making a voluntary decision to end his life because that decision itself is a product of his disorder. Courts routinely find that constitutional waivers are involuntary when they are the product of a mental disorder that specifically impacts the exercise of that right. E.g., Ward v. Sternes, 334 F.3d 696, 698-708 (7th Cir. 2003) (petitioner's aphasia (manifested as a disconnect between questions asked and answers received) prevented voluntary waiver of right to testify); Shafer v. Bowersox, 329 F.3d 637, 647-51 (8th Cir. 2003) (petitioner's personality disorder (manifested by impulsive decision-making) prevented voluntary waiver of trial rights by guilty plea); cf. Colorado v. Connelly, 479 U.S. 157, 169 (1986) (defendant's command hallucinations prevented him from making a "free decision" with respect to his right to remain silent; however, voluntariness under Fifth and Fourteenth Amendments must be linked to state action).

As in Shafer, Mr. Dennis' purported waiver is involuntary even assuming that he is competent. See 329 F.3d at 649-50. It was therefore error for the district court to conflate the standard for competency with the standard for voluntariness. See id. Applying the correct standard in this case can only lead to the conclusion that the evidence adduced below was insufficient to rebut the presumption that Mr. Dennis has not voluntarily waived his appeal rights. Therefore, this Court cannot accept the district court's conclusion of voluntariness.

V. THE EVIDENCE BEFORE THIS COURT, SHOWING THAT BOTH MR. DENNIS' PURPORTED WAIVER OF THE APPEAL AND HIS COMMISSION OF THE CAPITAL OFFENSE ARE PRODUCTS OF HIS MENTAL ILLNESS REQUIRES THIS COURT TO REEXAMINE THE SENTENCE OF DEATH

Finally, the circumstances of this case require this Court to reconsider its substantive position on allowing mentally ill defendants to dictate the unreliability of the record upon which this Court reviews death sentences and to abandon avenues of review that are necessary to ensure the reliability of such sentences. Although this Court has held that that the decision as to what mitigating evidence to place before the sentencer is a tactical one for counsel to make, McNelton v. State, 115 Nev. 395, 410-

> would otherwise ensue with someone in his physical condition. Kenneth survived artificially within a paralytic prison from which there was no hope of release other than death. But he asked no one to shorten the term of his natural life free of the respirator. He sought no fatal potions to end life or hurry death. In other words, Kenneth desired the right to die a natural death unimpeded by scientific contrivances.

Id. at 821. The court made it clear that:

> [I]f Kenneth had enjoyed sound physical health, but had viewed life as unbearably miserable because of his mental state, his liberty interest would provide no basis for asserting a right to terminate his life with or without the assistance of other persons. Our societal regard for the value of an individual life, as reflected in our federal and state constitutions, would never countenance an assertion of liberty over life under such circumstances.

Id. at 820.

Here, by contrast, Mr. Dennis not only "ask[s]" the state "to shorten the term of his natural life" but, according to Dr. Bittker, committed the homicide itself in order to induce the state to do so. Dr. Bittker further found that Mr. Dennis' wish to be executed is explicitly an alternative to committing suicide himself in order to free him from his mental illness; and this Court's position in McKay shows that an individual's "liberty interest would provide no basis for reasserting a right to terminate his life with or without the assistance of other persons," if that decision was motivated by his view that his life was "unbearably miserable because of his mental state." That is exactly what Mr. Dennis, with the assistance of the state, seeks here.

Most important from a policy standpoint, however, is the issue of deterrence. Courts continue to approve of the theory of general deterrence - - that is, that executing an offender may deter others from committing similar offenses - - despite the total absence of any persuasive evidence that there is such a deterrent effect.[15] Whatever validity that position may have in other cases, however, it can have no application at all in Mr. Dennis' case. Here, Dr. Bittker's report indicates that Mr. Dennis committed

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[15] Compare, e.g., Evans v. State, 117 Nev. 609, 28 P.3d 494, 514 (2001) (prosecution arguments based on theory of general deterrence proper), with Ruth D. Peterson & William C. Bailey, Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research, in America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction 157, 158-160 (James R. Acker, et al. Eds., 1998). Michael L. Radelet & Ronald L. Akers, Deterrence and the Death Penalty: The Views of The Experts, 87 J. Crim. L & Criminology 1 (1996); see also Brian E. Forst, The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's In Capital Punishment: A Reader 59, 66 (Glen H. Stassen ed. 1990) (empirical evidence for theory that certainty of punishment more effective deterrent than severity).

VI. CONCLUSION

For the reasons stated above, this Court cannot accept Mr. Dennis' attempt to withdraw this appeal, which is "directly a consequence," Report at 8, of his mental illness. Instead, this Court must re-evaluate its decision on direct appeal in light of Dr. Bittker's report, and conclude that imposition and execution of the death sentence would violate the Eighth Amendment.

Respectfully submitted this 26th day of January, 2004.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the Brief of Federal Public Defender As Amicus Curiae In Support Of Appellant, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 26th day of January, 2004.

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CERTIFICATE OF SERVICE

In accordance with Rule 5(b) of the Nevada Rules of Civil Procedure, the undersigned hereby certifies that on the 26th day of January 2004, a true and correct copy of the foregoing BRIEF OF FEDERAL PUBLIC DEFENDER AS AMICUS CURIAE IN SUPPORT OF APPELLANT, was deposited in the United States mail, first class postage prepaid, addressed to counsel as follows:

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * *

FILED

JAN 28 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY _____ DEPUTY CLERK

TERRY JESS DENNIS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Case No. 41664

ERRATUM TO BRIEF OF FEDERAL PUBLIC DEFENDER AS AMICUS CURIAE

Amicus Curiae submits the following correction to the brief submitted on January 27, 2004:

On page 4, line 6, "suppressed" should read supposed.

Respectfully submitted this 27th day of January, 2004.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY JESS DENNIS

Appellant,

v.

THE STATE OF NEVADA, No. 41664

Respondent.

/

OPPOSITION TO MOTION FOR LEAVE TO APPEAR AS AMICUS CURIAE

COMES NOW, the State of Nevada, and hereby opposes the Federal Public Defender's motion for leave to appear as amicus curiae. This opposition is made pursuant to Rule 27 of Nevada Rules of Appellate Procedure and the following points and authorities.

The Federal Public Defender moves this Court to appear as amicus curiae and to file an amicus brief on behalf of Dennis. The Federal Public Defender asserts an amicus brief is necessary because the district court erred by using the standard set forth in Dusky v. United States, 362 U.S. 402 (1960), and Geary v. State, 115 Nev. 79 (1999), in determining whether Dennis is competent to waive his appeal from the district court's order denying his petition for writ of habeas corpus(post-conviction). According to the Federal Public Defender, the district court should have evaluated Dennis's competency under Rees v. Peyton, 384 U.S. 312 (1966).

This Court should deny the Federal Public Defender's motion for several reasons. In Dusky, the United States Supreme Court held that a defendant is competent to stand trial when he "has sufficient ability to consult with his attorney with a reasonable degree of rational understanding" and "has a rational as well as factual understanding of the proceedings against him." Dusky, 362 U.S. at 402 (1960). Accord, Geary, supra. In Rees, the Court held that in order to determine whether a prisoner is competent to forgo further habeas litigation, the trial court must determine whether the prisoner has the "capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." Rees v. Peyton, 384 U.S. at 314 (1966). Courts have held that the Dusky standard for determining whether one is competent to stand trial is necessarily the same standard in determining whether one is competent to waive appeals or other litigation as enunciated in Rees. See Groseclose v. Dutton, 594 F.Supp. 949, 957 n.4 (1984); Franz v. State, 296 Ark, 181, 188, 754 S.W.2d 839, 843 (1988). Accordingly, this Court's directive to the district court to use the Dusky standard in evaluating Dennis's competency to waive his habeas appeal was proper. There is no need for an amicus brief on the issue.

Furthermore, this Court is not required to follow the Rees standard. Here, Dennis pleaded guilty before a three judge

panel who sentenced Dennis to death. Dennis v. State, 116 Nev. 1075, 1080, 13 P.3d 434, 437 (2000). Dennis then filed a post-conviction petition for writ of habeas corpus. The district court dismissed the petition, and Dennis filed a notice of appeal. It is this appeal that Dennis desires to waive. It is well settled that there is no constitutional requirement that a state provide an appeal. See McKane v. Durston, 153 U.S. 684, 687 (1894)("It is wholly within the discretion of the State to allow or not to allow such a review."). If a state decides to confer a right of appeal, it is free to do so "upon such terms as in its wisdom may be deemed proper." Id. at 687-88. Consequently, the states have no constitutional obligation to provide for habeas post-conviction relief either. See United States v. MacCollom, 426 U.S. 317, 323 (1976); Pennsylvania v. Finley, 481 U.S. 551, 557 (1987)(noting that "[p]ostconviction relief is even further removed from the criminal trial than is discretionary direct review" and that "[i]t is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction."). If there is no constitutional right to an appeal or to habeas relief, then, a fortiori, there is no constitutional right to an appeal of a trial court's denial of habeas relief. It would therefore also follow there is no federal constitutional rule that mandates a specific standard in determining whether one is competent to waive his appeal from a state court order denying him habeas relief. Thus, the states are free to choose the competency

standard they desire regarding a non-constitutional right. See e.g., Slawson v. State, 796 So.2d 491, 502 (2001)(test for competency in waiving collateral proceedings is whether the defendant has the capacity to understand the consequences of waiving such proceedings); cf., Pennsylvania v. Finley, 481 U.S. 551 (1987)(rejecting the idea that the federal constitution dictates the exact form state assistance for post-conviction relief must assume); Van Tran v. State, 6 S.W.3d 257, 268 (1999)(where the Supreme Court held that a competency hearing is required only if a prisoner makes a "high threshold showing" that competency is genuinely in issue, the Court does not define the precise nature of the "high threshold showing," "but instead left that task to the states."). Accordingly, this Court need not entertain an amicus brief about the appropriate standard to use in evaluating competency in a case such as this one.

Nevertheless, even if this Court were to conclude that the Rees standard applies, the district court's canvass of Dennis and its findings of fact satisfy Rees. In Franklin v. Francis, 144 F.3d 429, 433 (1998), the Sixth Circuit held that the Rees "test is not conjunctive but rather is alternative. Either the condemned has the ability to make a rational choice with respect to proceeding or he does not have the capacity to waive his rights as a result of his mental disorder. This conclusion is in line with all of the Supreme Court decisions and other court decisions since Rees was decided in 1966." Franklin, therefore, observes that a prisoner may suffer from a mental disorder but

still be able to rationally choose between his options of pursuing an appeal or waiving further legal rights. Id. See also Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993)("The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings."); State v. Berry, 74 Ohio St.3d 1504, 659 N.E.2d 796, 796 (1996)(holding that "[a] capital defendant is mentally competent to abandon any and all challenges to his death sentence, . . . if he has the mental capacity to understand the choice between life and death and to make a knowing and intelligent decision not to pursue further remedies").

Here, Dr. Bittker found that Dennis "has a rational and factual understanding of the proceedings [and] is fully aware of the charges that he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty." (Amicus Appendix, 88). Dr. Bittker found that Dennis is "aware of the legal options available to him and the consequences of his not proceeding with these options." Id. Dr. Bittker further determined that "[t]he medications he is taking are not having any unusual effect on the defendant's ability to make decisions in behalf of his own interest, and to cooperate with counsel or to participate in the court hearing." Id. The district court found "Dennis was lucid during the court's canvass, and understood the court's questions and the purpose of the hearing. Dennis answered the court's questions with intelligence and insight." Id. at 142. Dennis told the district

court he wanted the death penalty because he "took a life and I'm ready to pay for that with mine." Id. at 143.

It is apparent from these findings that Dennis has the ability to make a rational choice whether to continue or waive his appeal. See Smith v. Armontrout, 812 F.2d 1050, 1057 (8th Cir. 1987)(Rees's requirement that the prisoner have the capacity to appreciate his position and to make a rational choice requires only that he be cognizant of his factual circumstances, and that his choice be logical, the product of reason, without determining whether the prisoner was reasoning from premises or values that were "within the pale of those which our society accepts as rational"). He "has the capacity to appreciate his position," Rees, supra, because he "understands the choice between life and death," State v. Berry, 80 Ohio St.3d 371, 375, 686 N.E.2d 1097, 1101(1997), and "he fully comprehends the ramifications of his decision to waive further legal proceedings[.]" Id. See Cole v. State, 101 Nev. 585, 588, 707 P.2d 545, 547 (1985)(defendant's "decision to forego any appeal of his death sentence must be shown to be intelligently made and with full comprehension of its ramifications."). Even if he has a mental disorder, there is no evidence the disorder prevents him from making a rational decision to forgo his appeal. See State v. Berry, 80 Ohio St.3d 371, 374-75, 686 N.E.2d 1097, 1100-01(1997)(rejecting the idea that where there is a possibility a mental disorder affects a prisoner's decisionmaking capacity, the prisoner must be deemed incompetent); Smith v. Armontrout, 812 F.2d 1050, 1056 (8th Cir.

1987)(same). Indeed, the district court so found. Id. at 142. Accordingly, the findings of the district court also meet the Rees standard; and no amicus brief is therefore necessary.

"A condemned person is sane if 'aware of his impending execution and of the reason for it.'" Calambro v. Warden, 114 Nev. 961, 971, 964 P.2d 794, 800 (1998). The district court proceedings show that Dennis is competent to be executed. He should therefore also be competent to waive his current appeal. Because the Federal Public Defender has failed to show that the district court used an incorrect analysis in determining Dennis's competency, this Court should deny the motion to appear as amicus curiae.

DATED: February 6, 2004.

RICHARD A. GAMMICK
DISTRICT ATTORNEY

By _____
JOSEPH R. PLATER
Appellate Deputy

CERTIFICATE OF MAILING

Pursuant to NRAP Rule 25, I hereby certify that I am an employee of the Washoe County District Attorney's Office and that on this date, I deposited for mailing at Reno, Washoe County, Nevada, postage prepaid, a true copy of the foregoing document, addressed to:

Franny Forsman
Federal Public Defender
Michael Pescetta
Assistant Federal Public Defender
330 South Third Street, #700
Las Vegas, NV 89101

Scott W. Edwards, Esq.
729 Evans Avenue
Reno, NV 89512

DATED: February 6, 2004

IN THE SUPREME COURT OF THE STATE OF NEVADA

TERRY JESS DENNIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41664

FILED

MAR 12 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order dismissing without an evidentiary hearing a first post-conviction petition for a writ of habeas corpus in a capital case.

Appellant Terry Jess Dennis was charged by information with first-degree murder with the use of a deadly weapon for the March 1999 willful, deliberate and premeditated strangulation killing of Ilona Straumanis. Dennis was evaluated by a psychiatrist, determined to be competent to stand trial, and entered a guilty plea to the charge against him. Prior to accepting his plea, the district court thoroughly canvassed Dennis, finding that he was competent to enter a plea and that his plea was knowingly and voluntarily entered. Ultimately, a three-judge panel sentenced Dennis to death.[1] Dennis directly appealed to this court, and we affirmed his conviction and death sentence.[2]

On April 10, 2001, Dennis filed in the district court a timely post-conviction petition for a writ of habeas corpus. The district court

[1]Dennis v. State, 116 Nev. 1075, 1076-81, 13 P.3d 434, 435-38 (2000).

[2]Id. at 1087, 13 P.3d at 442.

appointed counsel, who supplemented the petition. On June 4, 2003, the district court dismissed the petition without an evidentiary hearing. After Dennis appealed to this court, the State moved for remand. The State's motion was based on letters Dennis addressed to the district court and the Washoe County District Attorney, dated September 9 and 17, 2003, respectively. In these letters, Dennis expressed his desire to withdraw this appeal and requested assistance in doing so, stating that he had shared with his counsel, Karla K. Butko, his desire to withdraw the appeal but Butko was "doing all she [could] to delay things."

This court granted the State's motion and remanded the matter to the district court for further proceedings to determine Dennis's competency and the validity of any waiver of this appeal. Butko then moved the district court for permission to withdraw from representation. The district court granted Butko's motion and appointed replacement counsel. The court then ordered a competency evaluation by a psychiatrist.

Dr. Thomas E. Bittker conducted the evaluation and in a written report opined that (1) Dennis "does have sufficient present ability to consult with his attorney with a reasonable degree of factual understanding"; (2) he "has a rational and factual understanding of the proceedings[,] . . . is fully aware of the charges that he confronts, the implication of the sentence, and has a full understanding of what is involved in the death penalty [and] is also aware of the legal options available to him and the consequences of his not proceeding with these options"; (3) he "is currently taking medications that are reasonable and consistent with the diagnosis of Bipolar Disorder, and his primary

psychiatric problems, alcohol, amphetamine, and cocaine dependence,[3] are contained by virtue of the total institutional control in his life"; and (4) "[t]he medications that he is taking are not having any unusual effect on [his] ability to make decisions in behalf of his own interest, and to cooperate with counsel or to participate in the court hearing." To these opinions, Dr. Bittker added,

> [O]n the other hand, [Dennis] has sustained over years episodes of suicidal ideation, suicide attempts, and self-destructive behavior, which heralded both the instant offense and his current legal strategy. I believe, with a reasonable degree of medical certainty, that [Dennis's] desire to both seek the death penalty and to refuse appeals in his behalf are directly a consequence of the suicidal thinking and his chronic depressed state, as well as his self-hatred.
>
> Clearly, an alternative to consider is whether or not [Dennis's] view of himself is simply a realistic incorporation of society's view of his "monstrous" behavior. On the other hand, it is conceivable and, in my mind, likely that both the defendant's offense and his current court strategy spring[] from his psychiatric disorder and his substance abuse disorder, that he wishes to die and he wishes to be certain of a reasonably humane death. Consequently, the death penalty, as provided by the state, is quite congruent with both his intent and his psychiatric disorder.

On December 4, 2003, the district court conducted a hearing at which Dennis was present with replacement counsel, Scott W. Edwards.

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[3]Dr. Bittker also diagnosed Dennis with a variety of other disorders, including post-traumatic stress disorder, attention deficit hyperactivity disorder and mixed personality disorder with antisocial, cyclothymic, borderline and schizoid features.

The district court thoroughly canvassed Dennis on the issues of his competence and waiver of rights. On December 22, 2003, the court entered a detailed, written order finding that Dennis was competent to waive his rights and to decide whether to forgo further litigation that might delay or overturn his execution and that he voluntarily, knowingly and intelligently waived his rights to pursue further relief, including this appeal.

Finally, on February 2, 2004, Dennis filed a motion to voluntarily withdraw this appeal.[4] In this motion, Dennis's counsel, Edwards, states that Dennis consents to the voluntary withdrawal of this appeal, having had the benefit of Edwards's explaining to him the legal consequences of withdrawing the appeal, including that he cannot hereafter seek to reinstate the appeal and that any issues that were or could have been brought in the appeal are forever waived. We determine whether to grant this motion after a careful review of the district court's determinations and the evidence on Dennis's competence and the validity of his waiver of rights.

First, however, we note that the Federal Public Defender (FPD) has filed a motion for leave to appear in this appeal as amicus curiae on Dennis's behalf. The State has opposed the motion. Having reviewed this motion, we are not convinced that we should permit the FPD to appear in this appeal as amicus curiae. The literal meaning of "amicus curiae" is friend of the court, i.e. one who interposes in a judicial proceeding to assist the court by giving information on a matter of law

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[4]See NRAP 42.

which might otherwise escape the court's consideration.[5] While the amicus may have some interest in the resolution of the action, it must not assume a partisan position; its status is only that of a neutral advisor.[6] Having considered the FPD's motion, we conclude that the FPD is not a neutral bystander or advisor but seeks to advocate directly on Dennis's behalf. Edwards remains Dennis's counsel of record and has not sought leave to withdraw, and the FPD has not sought leave of this court to appear as counsel of record on Dennis's behalf. It appears, therefore, that the FPD is seeking to represent Dennis without formally entering an appearance on his behalf as counsel of record. Accordingly, the FPD is not properly acting as counsel of record or as amicus curiae. We are not otherwise persuaded that the FPD's appearance will assist this court, and we thus deny the FPD's motion for leave to appear as amicus curiae.

Next, we conclude that substantial evidence supports the district court's determination that Dennis is competent to make a rational choice to forgo further and possibly life-saving litigation, including this appeal.[7] Specifically, the evidence, including the transcript of the district court's canvass at the December 4, 2003 hearing and Dr. Bittker's report, shows that Dennis has sufficient present ability to consult with counsel to

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[5]See, e.g., New England, Etc. v. University of Colorado, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979).

[6]See Dunkelbarger Const. Co. v. Watts, 488 N.E.2d 355, 360 (Ind. Ct. App. 1986).

[7]See Geary v. State, 115 Nev. 79, 82-83, 977 P.2d 344, 346 (1999) (setting forth considerations relevant to competency determination), cert. denied, 529 U.S. 1090 (2000); Calambro v. District Court, 114 Nev. 961, 971, 964 P.2d 794, 800 (1998) (same), cert. denied, 525 U.S. 1149 (1999).

a reasonable degree of factual understanding and has a rational and factual understanding of the proceedings.[8] Dr. Bittker's opinions, which appear somewhat wide-ranging, merit extended discussion here. At the December 2003 hearing, Dennis's counsel, Edwards, noted the evidence of Dennis's various mental disorders as well as the portion of Dr. Bittker's report attributing Dennis's desire to seek the death penalty and refuse further appeal to his depressed state and self-hatred. Based upon this evidence, Edwards questioned whether Dennis has the "'capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation.'"[9] However, the district court conscientiously inquired further to resolve whether Dennis's various disorders affected his capacity. We are satisfied with the district court's assessment of the totality of evidence to determine that Dennis's mental disorders have not rendered him incompetent to waive his rights.

During the district court's canvass, Dennis denied that he reported to Dr. Bittker any suicidal ideation or hallucinations. He further denied having visual or auditory hallucinations.[10] He acknowledged past

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[8]See Geary, 115 Nev. at 83, 977 P.2d at 346 (citing Doggett v. Warden, 93 Nev. 591, 593, 572 P.2d 207, 208 (1977) (applying test for competence from Dusky v. United States, 362 U.S. 402, 402 (1960)).

[9]Quoting Rees v. Peyton, 384 U.S. 312, 314 (1966), cited in Calambro, 114 Nev. at 971, 964 P.2d at 800. See also Godinez v. Moran, 509 U.S. 389, 398 & n.9 (1993) (recognizing that there is no indication in Rees that its phrase "rational choice" means something different from "rational understanding" as used in Dusky, 362 U.S. at 402).

[10]In our previous opinion on direct appeal we noted that Dennis's records submitted at his sentencing showed that in 1995 he reported having audio hallucinations and was diagnosed with a substance-induced psychotic disorder at the time of one hospital admission. However, when

continued on next page . . .

suicidal feelings that were "usually behind alcohol" and past suicide attempts, but he denied feeling suicidal since having been imprisoned. Dennis indicated that he had been receiving medications in prison which had "pretty much squared [him] away." The record shows no suicide attempts by Dennis since the time of his 1999 guilty plea. In addition, Dennis was examined by a psychiatrist and was found competent prior to entry of his plea. The district judge who presided over the instant competency proceeding had also presided over the 1999 proceedings leading to Dennis's guilty plea and death sentence and was able to consider Dennis's cognitive abilities with that historical perspective.

Additionally, the transcripts from the December 2003 hearing indicate that Dennis was lucid during the canvass, understood the district court's questions and the purpose of the hearing, and answered the court's questions with intelligence and insight. The district court reviewed with Dennis the grounds raised in his habeas petition, and Dennis indicated that he was aware of and desired to give up his right to pursue all of these claims. Dennis showed a rational understanding of his legal position and the options available to him, including the claims raised in his habeas petition and the attendant legal proceedings, his right to proceed with this appeal, and the legal consequences of withdrawing the appeal and abandoning further litigation. He understood, specifically, that by choosing to waive his rights to pursue further relief he would face imminent execution. Dennis repeatedly expressed and remained steadfast in his desire to forgo further proceedings that might delay or stop his

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. . . continued
receiving medical treatment subsequent to 1995, Dennis denied having any hallucinations. Dennis, 116 Nev. at 1080 n.4, 13 P.3d at 437 n.4.

execution. At one point, he stated, "[My attorneys] about browbeat me to death, but no, I'm staunch in my decision." Finally, Dennis articulated rational reasons for choosing to forgo his legal challenges and be executed.[11] He explained, "[B]asically, I took a life and I'm ready to pay for that with mine," and "I would rather not live than continue to live and be a doddering old man in prison." In sum, the record demonstrates that Dennis's decision was "intelligently made and with full comprehension of its ramifications."[12] Furthermore, it is plain that Dennis is aware of his impending execution and the reason for it.[13]

The district court determined that "Dennis does not suffer from any disease or mental defect that prevents him from making a rational choice among his various legal options—including whether to pursue any further litigation that may save his life." Substantial evidence supports this factual finding as well as the district court's ultimate finding that Dennis is competent to waive his rights and determine whether to abandon further proceedings on his writ petition, including this appeal.[14]

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[11]See Ford v. Haley, 195 F.3d 603, 619-24 (11th Cir. 1999).

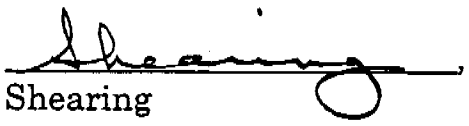
[12]Cole v. State, 101 Nev. 585, 588, 707 P.2d 545, 547 (1985).

[13]See Calambro, 114 Nev. at 971, 964 P.2d at 800 (citing Demosthenes v. Baal, 495 U.S. 731, 733 (1990)).

[14]Cf. Rumbaugh v. Procunier, 753 F.2d 395, 398-403 (5th Cir.) (upholding lower court's determination that defendant was competent despite concerns raised by reports from mental health professionals that defendant's mental illness influenced his decision to seek death), cert. denied, 473 U.S. 919 (1985); Calambro, 114 Nev. at 972, 964 P.2d at 801 (upholding district court's determination that defendant was competent where evidence showed he was basically rational though he exhibited borderline mental retardation, was probably to some degree schizophrenic and had a history of hearing voices).

We further conclude that ample evidence likewise supports the district court's determination that Dennis's waiver of rights and decision to withdraw this appeal are voluntary, not the result of any improper influence, and are knowingly and intelligently made. Thus, we grant Dennis's motion to voluntarily withdraw this appeal, and

ORDER this appeal DISMISSED.[15]


Shearing, C.J.


Becker, J.


Gibbons, J.

cc: Hon. Janet J. Berry, District Judge
Scott W. Edwards
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Federal Public Defender
Washoe District Court Clerk

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[15]We do not consider the FPD's arguments set forth in its proposed amicus brief; however, we direct the clerk of this court to file the FPD's brief and appendix received by this court on January 27, 2004.

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Post-it® Fax Note 7671 | Date 6-7-04 | # of pages ▶ 4
To Michael Pescetta | From Barrie McGuinness
Co./Dept. Chief Dep. Fed PD | Co. NDOC
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FILED
MAY 17 2004
RONALD A. LONGTIN, JR., CLERK
By: [redacted] DEPUTY

RECEIVED
JUN 07 2004
Federal Public Defender
Las Vegas, Nevada

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,

IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

TERRY JESS DENNIS,

Defendant.

Case No. CR99-0611

Dept. No. 1

MAY 18 2004

WARRANT OF EXECUTION

A JUDGMENT OF DEATH has been previously entered against the above-named Defendant, following this Court's verdict of guilty to Count I, FIRST DEGREE MURDER.

IT IS HEREBY ORDERED that the County Clerk of the County of Washoe, State of Nevada, shall forthwith, execute, in triplicate, under the Seal of the Court, certified copies of the Warrant of Execution, the Judgment of Conviction, and of the entry thereof in the Minutes of the Court. The original of the triplicate copies of the Judgment of Conviction, Warrant of Execution, and entry thereof in the Minutes of the Court, shall be filed in the Office of the County Clerk, and two of the triplicate copies shall be immediately

delivered by the Clerk to the Sheriff of Washoe County, State of Nevada.

IT IS FURTHER ORDERED that one of the triplicate copies be delivered by the Sheriff to the Director of the Department of Prisons or to such person as the Director shall designate. The Sheriff is hereby directed to take charge of the Defendant and transport and deliver the Defendant, forthwith, to the Director of the Department of Prisons at the Nevada State prison located at or near Carson City, State of Nevada, and said Defendant is to be surrendered to the custody of the said Director of the Department of Prisons or to such authorized person so designated by the Director of the Department of prison, for the imprisonment and execution of the said Defendant, in accordance with the provisions of this Warrant of Execution.

IT IS FURTHER ORDERED the Director of the Department of Prisons. or such persons as shall by him be designated, shall carry out said Judgment and Sentence by executing the said Defendant by injection of a lethal drug, within the limits of the State prison located at or near Carson City, State of Nevada, during the week of Monday July 19 through Sunday July 25, 2004, in the presence of the Director of the Department of prisons, and not less than six nor more than nine reputable citizens over the age of twenty-one years, to be selected by the said Director of the Department of Prisons, and a

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competent physician, but no other persons shall be present at said execution. NRS 176.345.

DATED this 17th day of May, 2004.

Janet J. Berry

JANET J. BERRY
DISTRICT JUDGE

CODE 3143
Richard A. Gammick
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P.O. Box 30083
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Attorney for Plaintiff

FILED
MAY 17 2004
RONALD A. LONGTIN, JR. CLERK
By: M. Lodi
DEPUTY

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF WASHOE.

* * *

THE STATE OF NEVADA,

Plaintiff,

v.

TERRY JESS DENNIS,

Defendant.

Case No. CR99-0611
Dept. No. 1

/

ORDER OF EXECUTION

A JUDGMENT OF DEATH has been previously entered against the above-named Defendant, as a result of the Court's verdict of guilty to Count I, FIRST DEGREE MURDER; and

WHEREAS, this Court has made inquiry into the facts and found no legal reasons against the execution of the Judgment of Death,

IT IS HEREBY ORDERED that the Director of the Department of Prisons shall execute the Judgment of Death by an injection of a lethal drug, within the limits of the State Prison located at or near Carson City, State of Nevada, during the week of Monday July 19 through Sunday July 25, 2004, in the presence of the Director of the

Department of Prisons, and not less than six nor more than nine reputable citizens over the age of twenty-one years, to be selected by the said Director of Prisons, and a competent physician, but no other person shall be present at said execution. NRS 176.345.

DATED this 17th day of May, 2004.

Janet J. Berry

JANET J. BERRY

Supreme Court of Nevada.

Terry Jess **DENNIS**, Appellant,
v.
The STATE of Nevada, Respondent.

No. 34632.

Dec. 4, 2000.

Defendant was convicted upon guilty plea in the Second Judicial District Court, Washoe County, Janet J. Berry, J., of first-degree murder with the use of a deadly weapon and was sentenced to death. Defendant appealed. The Supreme Court, Becker, J., held that: (1) inquiry into excessiveness of death sentence, while not involving a proportionality review, may involve a consideration of whether various objective factors previously considered relevant to excessiveness in other cases are present; and (2) death sentence was not excessive.

Affirmed.

West Headnotes

[1] Sentencing and Punishment ⚿1705
350Hk1705

Capital sentencing panel's finding of three aggravating circumstances, in form of three prior felony convictions involving use or threat of violence to the person of another, was supported by felony assault conviction for putting knife to victim's neck and then ripping blade through victim's hand, by felony arson conviction for setting on fire a house in which an individual with whom defendant had quarreled was visiting, and by felony assault conviction for lunging with knife at officer who responded to arson report. N.R.S. 177.055, subd. 2, 200.033, subd. 2(b).

[2] Sentencing and Punishment ⚿1668
350Hk1668

[2] Sentencing and Punishment ⚿1700
350Hk1700

[2] Sentencing and Punishment ⚿1702
350Hk1702

Death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, where three-judge sentencing panel considered evidence of charged murder, background and characteristics of defendant, and both the aggravating and mitigating circumstances before concluding that aggravating circumstances outweighed the mitigating and a death sentence was appropriate. N.R.S. 177.055, subd. 2(c).

[3] Sentencing and Punishment ⚿1788(5)
350Hk1788(5)

Supreme Court review a death penalty for excessiveness under death penalty statute considering only the crime and the defendant at hand. N.R.S. 177.055, subd. 2(d).

[4] Sentencing and Punishment ⚿1788(5)
350Hk1788(5)

Inquiry into excessiveness of a death sentence, while not involving a proportionality review, may involve a consideration of whether various objective factors that were previously considered relevant to excessiveness in other cases are present and suggest the death sentence under consideration is excessive. N.R.S. 177.055, subd. 2(d).

[5] Sentencing and Punishment ⚿1676
350Hk1676

[5] Sentencing and Punishment ⚿1705
350Hk1705

[5] Sentencing and Punishment ⚿1709
350Hk1709

[5] Sentencing and Punishment ⚿1712
350Hk1712

Death penalty imposed for first-degree murder with use of deadly weapon was not excessive, despite defendant's mental illness and his intoxication from alcohol at time of crime, where defendant deliberately strangled victim over course of five to ten minutes and made efforts to assure her death, and aggravating circumstances in form of three prior felony convictions showed continuing pattern of violence spread out over time and increasing in severity. N.R.S. 177.055, subd. 2(d).

**435 *1075 Michael R. Specchio, Public Defender, and John Reese Petty, Chief Deputy Public Defender, Washoe County, for Appellant.

Frankie Sue Del Papa, Attorney General, Carson City; Richard *1076 A. Gammick, District Attorney, and Joseph R. Plater III, Deputy District Attorney, Washoe County, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

BECKER, J.:

The State charged appellant Terry Jess Dennis by information with one count of first-degree murder with the use of a deadly weapon for the March 1999, willful, deliberate and premeditated strangulation murder of Ilona Straumanis. The State subsequently filed a notice of intent to seek the death penalty.

On April 16, 1999, Dennis entered a guilty plea, pursuant to a written plea agreement, to first-degree murder with the use of a *1077 deadly weapon. A penalty hearing was conducted before a three-judge panel. The panel found that three alleged aggravators (three prior felony convictions involving the use or threat of violence to the person of another) were proved beyond a reasonable doubt. The panel also found two mitigating circumstances existed: Dennis was under the influence of alcohol when he killed Straumanis, and he suffers from mental illness. The panel concluded that the mitigating circumstances did not outweigh the aggravating circumstances and returned a verdict of death.

Dennis argues only that his sentence of death is excessive. We affirm.

FACTS

On the afternoon of March 9, 1999, Dennis, who was fifty-two years old, unemployed and homeless, telephoned the Reno Police Department ("RPD") Dispatch, and told a dispatcher that he had killed a woman and her body was in his room at a local motel. Dennis stated that he was in the same room watching television and would wait for police to arrive. Dennis also stated that dispatchers should send a coroner, as "[t]he bitch ha[d] been dead for three or four days."

An RPD detective responded to Dennis's motel room, contacted Dennis, and asked whether he had any weapons. Dennis stated that he had used his hands to kill the victim and did not have any weapons. He agreed to be interviewed and was transported to the police department.

At the police department, detectives advised Dennis of his *Miranda* [FN1] rights. Dennis waived his rights and agreed to be interviewed. When questioned about the murder, Dennis stated that his memory was unclear on certain details because he had consumed about a fifth of vodka a day for the past week. [FN2]

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

FN2. Following the interview, Dennis's blood alcohol level was tested and determined to be .112 and descending. However, Dennis does not dispute the knowing and voluntary nature of his statements.

During the interview, Dennis reported the following. He had been staying at the motel where the murder occurred since March 3, 1999. Two or three nights into his stay, he left his room to go to a local saloon. On his way to the saloon, he met the victim, who **436 was later identified as Ilona Straumanis, a fifty-six-year-old woman. Straumanis had bruises about her eyes and told Dennis that she had been beaten by another man. Straumanis accompanied Dennis to the saloon, and later, to Dennis's motel room. Thereafter and until the murder, both Dennis and Straumanis remained in an intoxicated state, staying in Dennis's room, except for a shared meal out and Dennis's outings to get more alcohol.

*1078 On the day he killed Straumanis, he left the room briefly because Straumanis was asking too many personal questions. Upon his return to the room, he and Straumanis engaged in a conversation about whether Dennis had ever killed anyone. Straumanis accused Dennis of being too kind to be capable of killing. Dennis then killed Straumanis, as he and she were "sort of" "making love."

He began strangling Straumanis with a belt. He

felt somewhat aroused by Straumanis's struggling, and as she was "fading," he engaged in anal intercourse with her. During the course of the killing, he took the belt off and used his hands to choke her, and then suffocated her by covering her nose and mouth, making sure that she was not breathing and that "it was all done." He was not certain whether he finished the sexual act once she was dead. It took five or ten minutes to kill Straumanis, and Dennis checked her pulse afterward. He felt that he "had to make sure," so he "took [his] time."

After the murder, Dennis covered Straumanis's body and slept in the other bed. Prior to contacting police, Dennis also left the room at times to go to a local casino or the store for more liquor.

Dennis admitted that, although he had been drinking heavily prior to the murder and had stopped taking the medications prescribed for his mental health problems, he knew "exactly what [he] was doing" at the time of the murder. He killed Straumanis primarily because she challenged whether he was capable of killing, but also in response to a challenge from Straumanis regarding his sexual performance, which was affected by his drinking, and because he knew that he could kill her--she was "nobody" to him. He explained that he was probably thinking that Straumanis needed to be "put out of her misery" from the time he first met her and realized that she was "pathetic." He stated, "[W]hen I first met her, I had that ... idea that if you know I can talk her into ... coming back to my crib then done deal. Done deal." He saw himself as a "predator" and Straumanis as a "victim," and he felt that killing her was "the thing to do." Dennis had recently "picked up" another woman, intending to do the same thing to her, but she got frightened and left him before he could finish. From that experience he had learned to "[t]ake it a little slower," and he did so with Straumanis, trying to charm her into staying with him. Dennis was determined to kill Straumanis regardless of whether she survived his initial attack. He had been wanting to kill someone for a long time, and he felt at peace with killing Straumanis. Dennis stated that he did not care about anybody, including himself. He knew murder was wrong and did not care. Dennis also told detectives, "[I]f I didn't get stopped this would not be the last time that *1079 I would do something like this, because I found it exciting. I actually enjoyed it."

At the conclusion of the interview, detectives formally placed Dennis under arrest.

Meanwhile, another RPD detective searched Dennis's motel room pursuant to a search warrant. There, the detective discovered Straumanis's nude dead body underneath a blanket on one of the two beds in the room. Straumanis's body was found in a prone position with spread legs. A pillow underneath Straumanis's pelvis caused her buttocks to protrude upward. The detective also discovered a leather belt on the floor of the motel room and numerous empty beer and Vodka containers, along with other debris.

An autopsy performed on Straumanis's body on March 10, 1999, showed that she had died between three and seven days earlier as a result of asphyxia due to neck compression, most likely by strangulation. Straumanis's neck bore a rectangular-shaped injury. Other injuries were determined to have occurred sometime within the few days prior to her **437 death, including a small abrasion on the forehead, a bruise on the back of one thigh, and a fractured sternum. Changes caused by decomposition of Straumanis's body made determination of the existence of any sexual assault difficult. Although Straumanis's anus was dilated, there was no evidence of injury to the perianal skin or distal rectum. Testing revealed that Straumanis had a blood alcohol content of 0.37.

The State charged Dennis by information with one count of first-degree murder with the use of a deadly weapon. The State subsequently filed a notice of intent to seek the death penalty, alleging four aggravating circumstances: that Dennis subjected Straumanis to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder, and that Dennis had been previously convicted of three separate felonies involving the use or threat of violence to the person of another--a 1979 conviction for second-degree assault, a 1984 conviction for second-degree assault, and a 1984 conviction for second-degree arson.

Counsel were appointed to represent Dennis and arranged to have a psychiatrist conduct a competency evaluation. The psychiatrist who conducted the evaluation concluded that, although

Dennis was clinically depressed, he was competent to stand trial and assist in his defense.

On April 16, 1999, Dennis entered a guilty plea to first-degree murder with the use of a deadly weapon pursuant to a written plea agreement. The district court thoroughly canvassed Dennis, who stated his desire to plead guilty though he faced a possible death penalty. Dennis explained that he had been in prison twice before *1080 and did not consider living in prison to be " living at all." He did not want to "waste away" in prison for the remainder of his life, and would rather "get it over faster than that." Ultimately, the court accepted Dennis's plea, finding that Dennis was competent to enter a plea and that his plea was knowing and voluntary.

On July 19 and 20, 1999, a penalty hearing was conducted before a three-judge panel of the district court. The State presented evidence relating to the facts and circumstances of Straumanis's death, including Dennis's own statements regarding the crime and evidence in support of the alleged aggravating circumstances. The panel was also informed that Dennis had a total of nine prior convictions: the three prior felony convictions alleged as aggravators, for which he served approximately two and one-half years in prison, and another older felony conviction for possession of a controlled substance, for which he served two years in prison. Dennis also had five prior misdemeanor convictions.

Dennis agreed to permit counsel to argue for a sentence less than death and submit a sentencing memorandum along with medical, psychiatric and jail records. [FN3] However, he expressed to the panel that he did not want to live in prison for the rest of his life, and he declined to present any additional evidence in mitigation or make any further statement in allocution.

FN3. The State stipulated to the admission of the memorandum and documents offered by the defense to show mitigation.

Dennis's records together with the panel's questioning of Dennis show that Dennis has a lengthy history of alcohol and substance abuse as well as suicide attempts. He first attempted suicide in 1965 and was hospitalized. However, it does not appear that Dennis was diagnosed with or treated for any mental health disorders until thirty years later. In 1995, he began a series of contacts with mental health professionals and was diagnosed with various disorders--primarily, a chronic depressive disorder. [FN4] The same records **438 show that Dennis was treated for his problems at various facilities by means of prescription drugs and therapy. Although he enjoyed periods of improved well being, he repeatedly discontinued his medications, declined further treatment and continued to consume alcohol against his doctors' advice.

FN4. Beginning in 1995, Dennis began a series of hospitalizations and outpatient treatments for various problems including Hepatitis C, alcohol abuse, recurrent depressive disorder, suicidal ideation and attempts, antisocial personality disorder, post-traumatic stress disorder attributed to abuse Dennis reported suffering as a child, bipolar disorder, and anger management problems. In 1995, Dennis also reported having audio hallucinations and was diagnosed with having a substance-induced psychotic disorder at the time of one admission for hospitalization. When receiving medical treatment subsequent to 1995, however, Dennis denied having any hallucinations, and it does not appear that Dennis's care providers noted any indications to the contrary.

*1081 Included among the medical records submitted were Veteran's Administration ("VA") records, which indicate that two months prior to killing Straumanis, Dennis was admitted to the VA Hospital in Reno when he reported to medical staff that he had stopped taking his medications and was trying to drink himself to death. He also reported picking up a girl the previous night, taking her to a motel, and having thoughts of killing her. At the time he was admitted, Dennis exhibited bizarre behavior, talking and answering to himself. However, he was discharged from the hospital after eight days. Reports from follow-up visits with VA medical personnel in February and on March 2, 1999, show no indication of any alarming behavior by Dennis and further show that he denied wanting to harm himself or others.

Counsel argued against a death sentence and alleged as mitigating factors that the murder was committed while Dennis was under the influence of extreme mental or emotional disturbance, *see* NRS 200.035(2), as well as numerous other circumstances, *see* NRS 200 .035(7). The panel found that Dennis made a knowing and voluntary

waiver of the right to present further mitigating evidence or make any further statement in allocution.

After hearing argument, the panel found that three of the four alleged aggravators were established: the three prior felony convictions. The panel also found two mitigating circumstances: Dennis was under the influence of alcohol when he killed Straumanis, and he suffers from mental illness. The panel concluded that the mitigating circumstances did not outweigh the aggravating circumstances and returned a verdict of death. Dennis timely appealed.

DISCUSSION

Dennis argues only that his sentence of death is excessive. However, where a sentence of death has been imposed, NRS 177.055(2) requires this court to review the record and consider in addition to any errors enumerated on appeal:

(b) Whether the evidence supports the finding of an aggravating circumstance or circumstances;
(c) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
(d) Whether the sentence of death is excessive, considering both the crime and the defendant.

We address each of these considerations in turn.

Whether the evidence supports the three-judge panel's finding of aggravating circumstances

[1] The panel found that the State had proved three aggravating circumstances: ***1082** three prior felony convictions involving the use or threat of violence to the person of another. *See* NRS 200.033(2)(b).

The record shows that in support of the 1979 felony assault conviction alleged as an aggravator, the State presented police reports, a certified copy of the judgment of conviction from the State of Washington, and testimony from the assault victim. This evidence showed that in December 1978, Dennis became intoxicated, argued with his girlfriend over his unemployment and threatened to kill her. He then held her up against a door and put a knife to her neck. During the altercation, he ripped the knife blade through her hand, saying, "[H]urts, don't it?" Although she managed to escape, the attack left her hand scarred. Police subsequently arrested Dennis at a local barroom frequented by him. He was thereafter convicted of second-degree felony assault and sentenced to a ten-year term of imprisonment, suspended for a five-year term of probation.

In support of the 1984 felony assault and felony arson convictions, each alleged as aggravators, the State presented police reports, certified copies of the judgments of conviction from the State of Washington, and testimony from victims. This evidence showed ****439** that in December 1983, Dennis had a personal relationship with a woman, "Bonnie," whose daughter, "Lana," was sixteen years old. Lana and Dennis had been involved in a dispute stemming from an incident when Dennis went on a "rampage" and kicked in the door of Bonnie's home while Lana and her siblings were present. A couple of days after this incident, Lana was at the home of a family friend. As the two were watching television and eating dinner, Dennis lit the home on fire. When Lana became aware of the fire, she contacted police.

When confronted by police responding to the arson report, Dennis acted as if he did not know what had precipitated a police response. He then swung a knife at an officer. Even after surrounded by five officers, he refused to drop the knife, saying that he wanted to make a point. He made menacing gestures with the knife toward each of the responding officers and threatened to stab anybody who tried to take his knife. He challenged the officers to shoot him and challenged a canine officer to let his dog loose so that Dennis could stab the dog. Dennis then lunged and thrust his knife at the canine officer, and was shot. Notably, although Dennis smelled of alcohol at the time of his arrest, the arresting officer reported there was no indication that Dennis was intoxicated or not in control of himself at the time of the assault. Dennis was convicted of one count each of second-degree assault and second-degree arson. He was sentenced to ten years of imprisonment on each count, to be served concurrently with each ***1083** other, and consecutively to the sentence for the 1979 assault conviction, for which his probation was revoked.

We conclude that this evidence is sufficient to prove each of the three aggravating circumstances found by the panel. *See generally Parker v. State*, 109 Nev. 383, 393, 849 P.2d 1062, 1068 (1993).

Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor

[2] The panel considered evidence of the crime, the background and characteristics of Dennis, and both the aggravating and mitigating circumstances. The panel then concluded that the aggravating circumstances outweighed the mitigating and a death sentence was appropriate. Our review of the record reveals no evidence that the panel imposed the death sentence under the influence of passion, prejudice or any other arbitrary factor.

Whether the sentence of death is excessive

Dennis contends that his sentence of death is excessive. He asks this court to compare his background, character, crime, and the mitigating and aggravating circumstances found in his case to those of defendants in other first-degree murder cases where we have either affirmed the judgment of death or determined the death penalty to be excessive. He contends that under this comparative review, his death sentence must be vacated because the relevant sentencing factors in his case are most similar to those in two cases where we concluded that the death penalties were excessive: *Haynes v. State*, 103 Nev. 309, 739 P.2d 497 (1987), and *Chambers v. State*, 113 Nev. 974, 944 P.2d 805 (1997).

The State argues that the comparative review sought by Dennis is unnecessary and suggests that such a review is tantamount to proportionality review, which was formerly required by NRS 177.055(2)(d), but was abolished by our Legislature in 1985. *See* 1985 Nev. Stat., ch. 527, § 1, at 1597.

Thus, we must determine whether the comparative review of death penalty cases has any proper role in our excessiveness analysis under NRS 177.055(2)(d).

From 1977 through 1985, NRS 177.055(2)(d) required that on appeal from a judgment of death, this court must consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases in this state, considering both the crime and the defendant." 1977 Nev. Stat., ch. 585, § 10, at 1545; 1985 Nev. Stat., ch. 527, § 1, at 1597. Proportionality review required "that we compare all [similar] capital cases [in this state], as well as appealed murder cases in which the death penalty was sought but not imposed, and set aside those **440 death sentences which appear comparatively *1084 disproportionate to the offense and the background and characteristics of the offender." *Harvey v. State*, 100 Nev. 340, 342, 682 P.2d 1384, 1385 (1984).

However, in 1984, the United States Supreme Court decided *Pulley v. Harris*, 465 U.S. 37, 43-44, 50-51, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), holding that the Eighth Amendment to the United States Constitution [FN5] does not require a proportionality review of death sentences, *i.e.*, an inquiry into whether the death penalty is unacceptable in a particular case because it is disproportionate to the punishment imposed on others similarly situated. The following year, the Nevada Legislature amended NRS 177.055(2)(d) to repeal the proportionality review requirement. *See* 1985 Nev. Stat., ch. 527, § 1, at 1597. In its current form, NRS 177.055(2)(d) provides only that this court must consider on appeal from a judgment of death "[w]hether the sentence of death is excessive, considering both the crime and the defendant."

FN5. U.S. Const. amend. VIII.

[3] We have recognized that pursuant to the 1985 amendment to NRS 177.055(2)(d), this court no longer conducts proportionality review of death sentences. *See, e.g., Thomas v. State*, 114 Nev. 1127, 1148, 967 P.2d 1111, 1125 (1998) *cert. denied*, 528 U.S. 830, 120 S.Ct. 85, 145 L.Ed.2d 72 (1999); *Guy v. State*, 108 Nev. 770, 784, 839 P.2d 578, 587 (1992). Instead, we review a death penalty for excessiveness considering only the crime and the defendant at hand. *Guy*, 108 Nev. at 784, 839 P.2d at 587.

In dispensing with proportionality review, we have recognized that penalties imposed in other similar cases in this state are "irrelevant" to the excessiveness analysis now required by NRS 177.055(2)(d). *See id.* Nonetheless, we have not entirely abandoned comparative review as part of that analysis. As noted by Dennis, in *Chambers*, 113 Nev. at 984-85, 944 P.2d at 811-12, we considered whether the imposition of a death sentence was warranted based upon comparisons

between Chambers and his crime and defendants and crimes in other cases in which we have reviewed judgments of death. Specifically, we compared and found that the circumstances of the crime and defendant in *Chambers* were similar to those in two cases where we had determined the death penalty was excessive: *Haynes* and *Biondi v. State*, 101 Nev. 252, 699 P.2d 1062 (1985). *Chambers*, 113 Nev. at 985, 944 P.2d at 811. We also compared "the circumstances of the murder and the defendant in [*Chambers*] with the circumstances in other cases in which this court has affirmed the death penalty." *Id.* at 984, 944 P.2d at 811. After considering the crime and defendant in *Chambers*, and in light of our comparative ***1085** review, we ultimately concluded that the sentence of death was excessive. *Id.* at 984-85, 944 P.2d 805.

[4] Nonetheless, *Chambers* does not stand for the proposition that this court will conduct proportionality review of death sentences as part of the excessiveness analysis despite the Legislature's abolishment of such review. The fact that others guilty of first-degree murder may have received greater or lesser penalties does not mean that a defendant whose crime, background and characteristics are similar is entitled to receive a like sentence. However, as apparent in *Chambers*, our determinations regarding excessiveness of the death sentences of similarly situated defendants may serve as a frame of reference for determining the crucial issue in the excessiveness analysis: are the crime and defendant before us on appeal of the class or kind that warrants the imposition of death? *See* NRS 177.055(2)(d) (court must consider whether sentence of death on appeal is excessive, "considering both the crime and the defendant"). This inquiry may involve a consideration of whether various objective factors, which we have previously considered relevant to whether the death penalty is excessive in other cases, are present and suggest the death sentence under consideration is excessive.

We conclude that, even using as a frame of reference the factors considered relevant to excessiveness in *Chambers* and *Haynes*, the ****441** cases upon which Dennis relies, the death penalty is not excessive here.

In *Haynes*, we relied on several objective factors to determine that the death sentence was excessive, *i.e.*, the killing in that case was " 'crazy' " and "motiveless"; the defendant, Haynes, was a "mentally disturbed person lashing out irrationally, and probably delusionally, and striking a person he did not know and probably had never seen before"; and the single aggravating circumstance, a prior felony conviction for armed robbery, was fifteen years old at the time of the crime and committed by Haynes when he was eighteen years old. 103 Nev. at 319, 739 P.2d at 503. We concluded that the case was comparable to *Biondi v. State*, 101 Nev. 252, 699 P.2d 1062 (1985), where the defendant killed a man in a barroom confrontation among strangers in an emotionally charged atmosphere, and where the only aggravating circumstance was a prior conviction for armed robbery. [FN6] *Haynes*, 103 Nev. at 319, 739 P.2d at 503. We noted that in *Biondi*, we had reduced ***1086** the death sentence to life without the possibility of parole. [FN7] *Id.* We finally concluded that Haynes did not deserve the death penalty. *Id.*

> FN6. Although *Haynes* was decided after the Legislature abolished proportionality review, we nevertheless conducted such a review because the crime in that case was committed two days before proportionality review was abolished. *Haynes*, 103 Nev. at 319 n. 5, 739 P.2d at 504 n. 5.

> FN7. In *Biondi*, we vacated the death sentence of the defendant because the penalty was disproportionate to sentences received in similar cases, including the codefendant's case. *Biondi*, 101 Nev. at 258-60, 699 P.2d at 1066-67.

As noted previously, we likewise determined the sentence of death was excessive in *Chambers*, after concluding the case was comparable to *Haynes* and *Biondi*. *Chambers*, 113 Nev. at 984-85, 944 P.2d at 811-12. In doing so, we relied on several objective factors, including that Chambers murdered the victim in a drunken state, which indicated no advanced planning, during an emotionally charged confrontation in which Chambers was wounded and his professional tools were being ruined. *Id.* at 985, 944 P.2d at 811-12. We further noted that the only valid aggravating factor in *Chambers*, prior felony convictions for robberies, "referred to crimes that occurred eighteen years before the verdict in question, when Chambers was eighteen years old," which "hardly shows a pattern of violence sufficient to justify the death penalty." *Id.* at 984-85, 944 P.2d at 811.

[5] Considering Dennis and his crime, we conclude that the objective factors relied on in *Haynes* and *Chambers* do not indicate the death penalty is excessive here. Dennis deliberately strangled Straumanis over the course of five to ten minutes and made efforts to assure her death. Unlike the defendants in *Haynes* and *Chambers,* evidence here shows a high degree of callousness and premeditation by Dennis. Dennis disputes this on appeal, suggesting that the evidence obtained during his interview with RPD should be discounted because much of what he said during his interview was "puffing" and "macho-image making," designed to make detectives take seriously his desire to be put to death. [FN8] However, Dennis's account of the crime is not inconsistent with the physical evidence. No evidence indicates that Dennis exaggerated the willful, premeditated and deliberate nature of the crime or that his callous indifference toward Straumanis was contrived. No evidence shows that the killing was the result of uncontrollable, irrational or delusional impulses or occurred during an emotionally charged physical confrontation. Accordingly, neither Dennis's mental illness nor his being under the influence of alcohol at the time of the crime renders his death penalty excessive. *Cf. DePasquale v. State*, 106 Nev. 843, 803 P.2d 218 ***1087** (1990) (death sentence not excessive although defendant had history of mental illness); *Geary v. State*, 115 Nev. 79, 977 P.2d 344 (1999) (death sentence not excessive where defendant was in drunken rage when he killed victim), *cert. denied,* 529 U.S. 1090, 120 S.Ct. 1726, 146 L.Ed.2d 646 (2000).

> FN8. In support of this, he points to his statements during the interview showing that at the time of the interview, he was suffering the effects of alcohol withdrawal, and his statements exaggerating his prior military experience and falsely indicating that he had killed others before Straumanis.

****442** Further, in this case, the prior felony convictions found as aggravating circumstances demonstrate that Dennis is a dangerous and violent man. There is no indication that these crimes were committed during any physical confrontation or that Dennis was irrational, delusional or unable to control his actions at the time. One of the aggravating prior felonies was committed twenty-one years, and the others, sixteen years, before Straumanis's murder. Unlike the single valid prior felony aggravating circumstance in *Haynes* or *Chambers,* here the prior felonies are not isolated instances, but are part of a continuing pattern of violence, spread out over time and increasing in severity. Also, Dennis committed his first prior felony when in his early thirties and committed his second and third prior felonies when in his late thirties. Therefore, these felonies demonstrate Dennis's proclivity for violent crime, and their significance in this respect cannot reasonably be diminished by immature judgment at the time of the crimes.

The record demonstrates that Dennis committed a calculated, cold-blooded and unprovoked killing and has a propensity toward violent behavior. We have affirmed the death penalty in similar cases. *See, e.g., McKenna v. State*, 114 Nev. 1044, 968 P.2d 739 (1998), *cert. denied,* 528 U.S. 937, 120 S.Ct. 342, 145 L.Ed.2d 267 (1999); *see also Leslie v. State*, 114 Nev. 8, 952 P.2d 966, *cert. denied,* 525 U.S. 860, 119 S.Ct. 146, 142 L.Ed.2d 119 (1998); *Pellegrini v. State*, 104 Nev. 625, 764 P.2d 484 (1988). After considering Dennis's contentions on appeal, we conclude that the death penalty is not excessive in this case.

CONCLUSION

Our review of this appeal demonstrates that the evidence supports the finding of aggravating circumstances, the sentence of death was not imposed under the influence of passion, prejudice or any arbitrary factor, and the sentence of death is not excessive, considering Dennis and his crime. Accordingly, we affirm the judgment of conviction and sentence of death.

ROSE, C.J., YOUNG, MAUPIN, SHEARING, AGOSTI and LEAVITT, JJ., concur.

13 P.3d 434, 116 Nev. 1075

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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TERRY JESS DENNIS,

Appellant,

Case No. 41664

VS.

THE STATE OF NEVADA,

Respondent.

NOTICE OF WITHDRAWAL OF APPEAL

Terry Jess Dennis, appellant named above, hereby moves to voluntarily withdraw the appeal mentioned above, pursuant to NRAP 42.

I Scott W. Edwards, as counsel for the appellant, explained and informed Terry Jess Dennis of the legal effects and consequences of this voluntary withdrawal of this appeal, including that Terry Jess Dennis cannot hereafter seek to reinstate this appeal and that any issues that were or could have been brought in this appeal are forever waived. Having been so informed, Terry Jess Dennis hereby consents to a voluntary dismissal of the above-mentioned appeal.

DATED this 31st day of January, 2004.

Scott W. Edwards

Nevada Bar Number 3400
1030 Holcomb Ave.
Reno, NV 89502
(775) 786-4300

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CERTIFICATE OF SERVICE

I, Scott (e) Edwards hereby certify pursuant to N.R.A.P. 28, that on this 3rd day of January 2004 I caused to be delivered via Reno Carson Messenger Service a true and correct copy of the foregoing NOTICE OF WITHDRAWAL OF APPEAL addressed to:

WASHOE COUNTY DISTRICT ATTORNEY
APPELLATE DIVISION
P.O. BOX 30083
RENO, NV 89520-3083